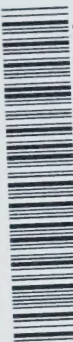


CA20N

Z 1

-80A021

LOVE PUBNS



3 1761 11649694 4





ROYAL COMMISSION ON MATTERS OF HEALTH AND SAFETY  
ARISING FROM THE USE OF ASBESTOS IN ONTARIO

CHAIRMAN: J. STEFAN DUPRE, Ph.D.

COMMISSIONERS: FRASER J. MUSTARD, M.D.

ROBERT UFFEN, Ph.D., P.Eng., F.R.S.C.

COUNSEL: JOHN I. LASKIN, LL.B.

APPEARANCES:

Miss L. Jolley	Ontario Federation of Labour
Mr. B. Riddell	Workmen's Compensation Board
Mr. T. Lederer	Government of Ontario
Mr. O. Buonastella	Injured Workers Consultants
Mr. Cauchi	Asbestos Victims of Ontario

180 Dundas Street  
Toronto, Ontario  
Wednesday,  
August 11, 1982

VOLUME 55



Digitized by the Internet Archive  
in 2023 with funding from  
University of Toronto

<https://archive.org/details/31761116496944>



ROYAL COMMISSION ON MATTERS OF HEALTH AND SAFETY

ARISING FROM THE USE OF ASBESTOS IN ONTARIO

VOLUME 55

INDEX OF WITNESSES:

MR. ALLAN GRANT MacDONALD	Examination-in-chief	Page 3
	Cross-examination (Jolley)	Page 76
	Exam-in-chief (cont'd.)	Page 81
	Cross-exam (Buonastella)	Page 131
	Cross-exam (Cauchi)	Page 135

INDEX OF EXHIBITS:

EXHIBIT # 5, PHASE 4:	Mr. Neal's document re experience rating	Page 128
EXHIBIT # 6, PHASE 4:	Red Booklet from WCB	Page 128





180 Dundas Street  
Toronto, Ontario  
Wednesday,  
August 11, 1982

VOLUME 55

THE FURTHER PROCEEDINGS IN THIS INQUIRY  
RESUMED PURSUANT TO ADJOURNMENT

APPEARANCES AS HERETOFORE NOTED

DR. DUPRE: May we convene, please?

The Commission this morning warmly welcomes Mr.  
A. G. MacDonald, the vice-chairman of administration and general  
manager of the Workmen's Compensation Board.

Mr. MacDonald, may I ask you please to come forward  
and be sworn?

MR. LASKIN: Mr. Chairman, while Mr. MacDonald is  
coming forward, I could introduce Mr. Bill Riddell, who is the  
Board's solicitor, and who is with Mr. Lederer today.

DR. DUPRE: Good morning, Mr. Riddell. You are  
very welcome here indeed, sir.

MR. RIDDELL: Thank you.

ALAN GRANT MacDONALD, SWORN

EXAMINATION-IN-CHIEF BY MR. LASKIN

Q. Mr. MacDonald, you are vice-chairman of  
administration and general manager of the Board?

A. That's correct.





Q. How long have you held that position?

A. I have held that position since 1972.

Q. How long have you been employed by the Board?

A. Since 1945 - thirty-seven years.

Q. Could you just tell us briefly what positions you have held within the Workmen's Compensation Board?

A. My experience in the Board has come up the financial side of the organization. My original position was chief statistician when I first came to the Board.

Subsequent to that I had director of accounting position, controller position, treasurer position, and essentially I came into the same position as an employee rather than a Board member, in 1967, as executive manager.

In the amending Act of 1972, the position of general manager or executive manager became a Board appointment, and I was appointed in the position of vice-chairman of administration, which is what the Act describes the position as, but also given by the Board the additional title of general manager to be consistent with the full function which I had been carrying on since 1967.

Q. What is your educational background?

A. I am a Bachelor of Commerce from the University of Toronto.

Q. Could you just very briefly tell us what your responsibilities are in your role as general manager/vice-chairman of administration?

A. As the Act stipulates, I am the chief administrative officer of the Board, and in the organization chart which I see somebody has kindly earlier on placed on the easel here, you will see that the various administrative functions of the Board report through me to the Board.

Most recently we have had one more position created, and that is the position we call assistant general manager and





5 A. (cont'd.) senior executive manager, in the person of Mr. Bill Kerr, and three departments report...three of the administrative departments report to me through him. Those departments are vocational rehabilitation, the claims department and the communications department.

10 Essentially what you have is all of the administrative departments reporting to the Board through me, and administratively we function with that group of people being a management committee, and they meet twice a month to deal with reporting on management activities, but also to deal with any changes in programs or other matters which need to be recommended to the Board for their approval.

15 Q. Of course, you are a member of the board?

A. I am also a member of the corporate board.

MR. LEDERER: Mr. Laskin, if I could just interrupt, I'm getting signals from the reporter. I don't think that the tape machine is picking up your voice, Mr. MacDonald. Sit a little closer to the mike, if you will. Thank you.

20 MR. LASKIN: Q. There are at present how many members of the corporate board?

THE WITNESS: A. The Statute calls for a maximum of seven members of the corporate board. At the moment there are six members. There is one vacancy.

25 Q. That would be the chairman, yourself, the vice-chairman of appeals and three commissioners of appeals?

A. Three commissioner of appeals, yes.

Q. Of those members, how many are full-time members?

A. All of them are.

30 Q. Just out of curiosity, in the pre-1972 days, when I take it your position was not a board position, who comprised the corporate board?

A. At that time there was a chairman, a vice-chairman





A. (cont'd.) and a commissioner.

Q. Is the position that was then vice-chairman  
5 now vice-chairman appeals, or was the position abolished?

A. There was no equivalent position to either of  
the current vice-chairman positions. The vice-chairman was simply  
that, he was the vice-chairman of the board. It wasn't even  
referred to as a corporate board, there was just a board. And in  
fact there were no commissioners in addition to commissioners of  
10 appeals, at that time.

Q. So that do I take it in 1972, when the Statute  
was amended, that there was a restructuring of the board and a  
designation as a corporate board?

A. The title corporate board is one of custom  
and usage. It is not in fact legally constituted in the Statute  
15 itself. It was a convenient way of describing the group of people  
who dealt with administrative activities in addition to being  
persons who sat on appeals in claims matters, or other decisions  
made throughout the organization.

Q. But when you say it's a term of custom and  
usage, has there always been such a thing as the corporate board?  
20

A. Prior to 1972, there was just a board.

Q. A board. And after 1972, a so-called corporate  
board, as you have described it?

A. It became described that way to differentiate  
between it and those people who are just commissioners and whose  
25 sole role is to sit on hearings on decisions made at lower levels  
in the organization.

In fact, if you look at the terminology it's a bit  
misleading because they use the title commissioner of appeals for  
those people who in fact sit as corporate board members, and they  
use the word commissioners for those who in fact only sit on claims  
30 matters, I mean do sit on appeals.



DR. UFFEN: Are the commissioners full-time?

THE WITNESS: The commissioners are also all full-time.

MR. LASKIN: Q. And there are how many of those?

THE WITNESS: A. I believe there are seven or eight of them at the moment. Because we are anticipating there may be changes as it relates to the proposed White Paper and the legislation, we have not been filling vacancies as they may have occurred within either the corporate board or the other group, and have been maintaining business with the existing appointees. We are getting close to the position where the volumes are such that we would need to make some temporary appointments if there were to be no change, next year for example.

Q. Does the corporate board meet as a board?

A. The corporate board meets every month automatically, and oftener than that as required by a specific activity or a recommendation or a program that needs to be considered.

It meets the second Tuesday of every month, routinely.

Q. Just looking at the Statute, I see that in a general way the powers of the board are spelled out in what is now section seventy-one. Can you put some more flesh on that section for us, if you could? Can you tell us what the corporate board does?

A. The Commission has already been provided with the manual of administration and all of the procedures that are in place in the various departments, those having been previously established and approved by the corporate board or, in the early days, by the Board, prior to 1972. Many of the things were put in place even earlier than the present corporate board.

In essence, what the corporate board does is to deal with the new business, the new programs, the new issues that require their attention.

DR. UFFEN: In the absence of the chairman of the





DR. UFFEN: (cont'd.) corporate board, who occupies the chair?

5 THE WITNESS: There is a section of the Act that stipulates that one of the vice-chairmen shall be appointed to act, and I have been appointed by the current chairman and by the previous chairman to act in the absence of the chairman.

DR. UFFEN: Appointed or elected by the board?

10 THE WITNESS: It's done by board minute. It's to follow the requirements of the section that one of the vice-chairmen be named.

If you look at the section, the section says that one of the vice-chairmen shall be named, but the marginal note says the vice-chairman of administration shall be named.

15 I understand that legally either of the vice-chairman could in fact be appointed, by either the chairman or by the Minister of Labour, if he had failed to appoint.

MR. LASKIN: Q. Does the corporate board, as a board, have any decision-making function in individual cases, as opposed to a policy-making role generally?

20 THE WITNESS: A. Not in practice. It does not deal, as a corporate board, with claims appeals.

Q. I take it...

25 A. There are some exceptions. The main exception that has any volume is those cases which may be dealt with by the ombudsman, where there has been a difference of opinion as between the panel which heard the case and the ombudsman's findings, when he has reviewed the matter.

30 If that difference of opinion is reported on in the ombudsman's report, and it to be then considered by the ombudsman's committee, the committee of the House that has been appointed in that capacity, then there is a requirement that that decision be reviewed in the light of all the circumstances, by the





5 A. (cont'd.) corporate board, in order to take a position before that committee. Those kind of cases are the only cases that have been coming routinely to the board for further consideration.

Q. In those cases does the board have the power to review, and if necessary reverse, a decision that would have been made by either an appeals adjudicator or commissioners of appeal?

10 A. I think it's quite clear from the Statute that the board has the authority to make a further decision and change a decision, yes, and there have been cases where that has occurred.

Q. Where these cases are referred back after having been subjected to some comment by the committee on the ombudsman?

15 A. In essence, what the board has done is either agreed with the panel or agreed with the ombudsman.

Q. Apart from those cases, do I also take it from reading the Statute that the board does have the power, whether it exercises it or not, to in fact hear an appeal, as a board, from a decision of the commissioners of appeal?

20 A. I believe there is a section which...I can get you the number...which stipulates that either the chairman or the vice-chairman has the power to empower a person or a panel or themselves to review a panel decision. The power is there, yes.

Q. That would appear to be section seventy-eight.

25 A. Seventy-eight, yes.

Q. And it's, without belaboring the point, but as I understand it that provision or its predecessor was the provision utilized in the Dodds case, which is the one matter that went up to the board by way of appeal in that fashion?

30 A. That is correct.

Q. The commissioners of appeal, apart from their



5 Q. (cont'd.) responsibilities in hearing appeals, and apart from their responsibilities as members of the corporate board and sitting at board meetings, do they have any other responsibilities within the organization?

A. No.

10 Q. Could you just tell us very briefly what generally are the backgrounds of those members, the commissioners of appeals and the vice-chairman of appeals?

A. Are you talking about the general background of people who were appointed,...

Q. Yes.

A. ...or the specific backgrounds of the current people?

15 Q. Well, you seem to have come up through the organization and got to the board through long service and no doubt many promotions. Can the same be said of the commissioners of appeal and the vice-chairman of appeals?

20 A. Going back over the whole history of the board, the appointments, of course, are by Lieutenant-Governor in council by order-in-council. The persons that seem to have been selected for those positions had a background in labour, had a background in management, had background in law, had background in administration similar to board activity.

25 The current individuals - one of the commissioners of appeals is a doctor and a lawyer and a long-term employee of the Board, formerly having worked in the old appeal tribunal.

One of the other members is...

Q. Who is that?

A. That's Dr. W...Bill Jacobs.

30 Doug Hamilton is a former secretary of the Federation of Labour, a former commissioner of the TTC, one of the members of the Labour Safety Council and the McGillvray commission, but quite





A. (cont'd.) a long background of experience in related fields.

5 Q. But outside the Board, I take it?

A. But outside the Board.

Mr. McEwan is a person with a lot of experience in industry, having been president of a number of companies.

10 Mr. Tom McEwan (sic), who is the vice-chairman of appeals, is a long-time worker in industry and in the public arena in a general way.

The chairman, Lincoln Alexander, I don't need to tell you about him. He has been in the whole world of law and politics and administration, former minister of labour in the Clark government - that kind of background.

15 If you go back over the years, you will find that most of the people who have been there have had similar backgrounds.

I am the one person who grew up with the organization.

Q. Are you somewhat unique in that regard, in terms of people who were on the corporate board as having grown up with the organization?

20 A. I am the first person who ever was appointed to the corporate board from the staff.

MR. LEDERER: I'm sorry. Can I just interrupt again?

25 I'm afraid the people in the back are now having a little bit of trouble hearing. The microphones, I think, only go to the tape recorder. There is no amplification in the room itself, so for people to hear you in the back, they need to hear your voice unamplified.

30 THE WITNESS: Will you hold up your hand if you are not hearing me anytime? My voice is pitched at a level that I guess just isn't always heard. I've had that problem before, for which I apologize.

MR. LASKIN: Q. I appreciate your comment that of





Q. (cont'd.) course the Lieutenant-Governor in Council appoints the board members.

5 Can I ask you, Mr. MacDonald, is there any recommendation for those appointments that comes from the board itself?

10 A. As far as the corporate board members are concerned, we have never been requested to make any recommendations about appointments. We have had input into appointments of commissioners, and in fact some board employees, former board employees have been appointed as commissioners - that is, to sit on appeals.

15 Q. Commissioners as distinct from commissioners of appeals?

A. As distinct from commissioners of appeals, yes.

20 Q. One of the subjects that we have discussed with some of the medical personnel from the Board, in relation to this Commission, has been guidelines for compensation of asbestos-related diseases, and can I ask you whether you are familiar with those guidelines...not in a specific way, but...

A. In a general way? Yes, I am.

25 Q. Do those guidelines find their way up to the corporate board for approval before they are in fact implemented?

A. Yes.

30 Q. During the course of the discussion that we have had about those guidelines...and I'm not going to ask you about them specifically...we did have some discussion about the Board's utilization of guidelines as opposed to the Board's utilization of schedule three to the Statute, and one of the things that I would be interested in is knowing whether the subject matter of using guidelines to compensate for disease claims as opposed to expanding your schedule three has been a subject that has been discussed at the board level.



5 A. It's a subject that hasn't been discussed in recent years. I looked back into the corporate records as it relates to the decision not to expand schedule three, and it goes back into the forties. The board at that time concluded that with the proliferation of substances and conditions that it would be impossible to constantly keep adjusting schedule three.

10 Further, the evidence was that the absolute relationship between industrial process and those conditions was not such that you could justify automatic presumptions, and therefore the general section of relying on diseases peculiar to or characteristic of an industry, became relied on as a basis for including a disease, and then if it were necessary to establish guidelines to differentiate between those which were caused in industry and those which could be said to have been caused outside  
15 of industry, it was best done by guideline.

So that was a general decision taken back at that time.

Q. Okay. And does that...

20 A. And really, while I see it is being discussed now, that really has never been challenged before the Board, as a process.

Q. Do I take from that that the decision that the Board made at that time has been a decision which has remained in effect as Board policy, if you will, since the 1940's?

A. Yes.

25 Q. Was there any fuller discussion in the corporate records at that time as to what would make it difficult to continually be revising schedule three? Was it the fact that you would have to resort to Cabinet for approval?

A. That was never a factor, no.

30 Q. That was never a factor?

A. No.





Q. I take it just the general difficulty of having to reconsider constantly a fairly expanding field?

5 A. As I indicated, the proliferation of so many substances, so many situations, it didn't seem practical...and I think you'll find that other jurisdictions have taken the same position. I don't know of any group who have tried to name every process, name every product. It's almost an administrative nightmare to try to consider doing that.

10 As long as the evidence is on the other side that you have never, you know, hidden behind that approach to deny claims...our whole emphasis is, as you know, to delegate decision making to the lowest possible authority competent to make that decision, give the best guidelines and evidence on which to act, and then establish checks and guidelines and the appeal procedures that protect that.

15 Q. Appreciating what you said about the Board's policy on schedule three and being developed in the 1940's, am I correct that on the other side the Board's policy in utilizing guidelines for the compensation of industrial disease really didn't come about until the 1970's?

20 A. It wasn't actually required in terms of the cases that came before the Board, until the seventies.

25 I might comment as a relation to those guidelines, in every one of the guidelines you will notice that there is a clause which allows the Board to make exceptions based on the merits and justice of the individual case. There is a great emphasis by the Board on the need to have that section, so that we don't ever consider ourselves hidebound by all of the various periods which are described, latency periods and exposure periods. There is the opportunity, in every case, to make exceptions.

30 Q. Was the utilization of guidelines something that was discussed during your tenure as a member of the Board?





5 Q. (cont'd.) Was there some positive step taken by the Board to make greater use of, or to use guidelines and to continue to make greater use of them?

10 A. Well, as you have said, during the seventies the cases that were being reported obviously required the establishment of guidelines to differentiate between those that might have come along in the normal course of events and those which were industry caused. There was no other solution but to establish these standards.

15 Q. Okay. Was it the Board that was responsible for determining the way in which guidelines would be developed...and I'm thinking of what resort to expert medical opinion would be sought and whose recommendations would be considered as the appropriate guidelines, and so on...is that all something instilled and directed by the Board?

20 A. The Board directed that the various departments concerned should get all of the relevant material, get all of the background, get all of the best medical advice available to assist them in recommending guidelines to the Board. The Board did not impose any restrictions on its operating departments in getting the best scientific evidence available to establish the guidelines, and when that had been developed by the department concerned, the Board then, itself, approved the guidelines that were recommended.

25 But again, I keep emphasizing that at the Board's insistence there has always been, in every guidelines, a section that allows for exception.

Q. Individual assessment of those claims that don't fall within the particular...

A. Because of the requirement that the true merits and justice of each case should be dealt with by the Board.

30 Q. Did the Board ever give any consideration, or has it ever given any consideration to developing or establishing



5 Q. (cont'd.) somewhat of a permanent body or ongoing body, divorced from your regular staff, to review such guidelines that are in place, or consider the development of new guidelines?

I suppose I'm thinking of a body not unlike your advisory committee on occupational chest disease, but an advisory committee of that nature to deal with an ongoing review of guidelines.

10 A. Yes, we have had discussions about whether or not there was any advantage in establishing a body that seemed to be, let's say one more step removed from the Board itself.

15 It's essentially our conclusion that the public perception of any group that the Board fund, whether they are on our premises or wherever they are, that they are not considered by the public to be independent.

20 Frankly, what we would like to see, and I record this for the Commission, is that a truly independent authority should be established to assist the Board in establishment of guidelines where necessary in the future, and for the review of existing guidelines.

You will notice that Paul Weiler in his report, he has recommended that our appeal system be made separate from the Board.

25 I happen to believe that they are completely separate and independent now, but that's not what the public believes.

For us to simply set up a group like the chest advisory group, but continue to fund it, wouldn't accomplish the public perception that's necessary.

30 DR. DUPRE: I wonder if you just can elaborate a little bit on what you just said, Mr. MacDonald. As I take it, you would encourage this Commission, and for that matter anybody else





5 DR. DUPRE: (cont'd.) who is advising the government at this point, to consider with respect to the WCB some kind of legislative base on which, as you put it, an independent body could advise the WCB in the matter of setting guidelines.

THE WITNESS: And I would add research to that category. I think when the Board does it's own research, again, even though it's the best research in the world, it becomes suspect simply because the Board is seen to be doing it and paying for it.

10 DR. DUPRE: Dr. Mustard?

DR. MUSTARD: I may have misunderstood what you said in that discussion as well, about the other point you made that your appeals procedure is independent from the Board, at the present moment.

THE WITNESS: Yes.

15 DR. MUSTARD: Could you explain to me how you see the appeals procedure and how you see it as being independent from the Board?

20 THE WITNESS: In the first place, it's an entirely different group of people dealing with the cases. They are in a different location, there is in no way any line relationship between them and any part of the Board. They, in fact, are truly independent.

The one thing that makes them seem not independent is that they happen to be paid by the Board.

DR. MUSTARD: Who are they accountable to?

25 THE WITNESS: They are accountable to the vice-chairman of appeals.

DR. MUSTARD: And the vice-chairman of appeals is accountable to?

THE WITNESS: He is accountable to the Lieutenant-Governor in Council.

30 DR. MUSTARD: I see. He really is not accountable



DR. MUSTARD: (cont'd.) to the chairman of the board, because that's the thing that's bothering me on that chart.

5 THE WITNESS: Well, I think there is a line that infers he is accountable to, but in practice there is absolutely no way in which the chairman of the board...other than on the intervention of the section that we talked about, in an individual case, that there is ever any relationship.

10 But again, again, as long as you have that organization chart, and as long as you have the indication that they are on the Board's payroll, the public will not believe, in my judgement, that they are truly independent. But I'm telling you that I believe that there is complete independence of the whole appeal group - that there are in no way any inhibitions on  
15 them to do their job, in any way.

DR. UFFEN: I have a minor question in relation to this.

20 Do you use the word, the expression the Board in two contexts? Namely, the Board as the corporate board, the legal entity, or alternatively, the Board meaning all the other people that constitute the activities of the Board?

25 If this is a double use of the word, it might help us today...or me, anyway...and other people, if you made a distinction between the Board as it is designated in the law and the Board as represented by the permanent employees of the Board that make it able to work.

THE WITNESS: Fair enough.

30 DR. UFFEN: I could see some quite logic and understand your comment if the appeals were separate from the working staff of the board, colloquially referred to as the board with a small b, but I find difficulty in understanding the statements when you say they are independent of the corporate board.





5 THE WITNESS: Well, I believe they are independent of both the Board in the sense of the total working board, and the corporate board. They are a separate group of people and a separate location, with all of their own support staff. They deal...

DR. UFFEN: That's happened because of practice, and could change without changing any law or anything else, I would take it?

THE WITNESS: That is correct.

10 DR. UFFEN: I see.

THE WITNESS: But this change in divorcing the appeals group took place shortly after 1965, and there was a true separation at that point into two groups that had no interrelationship in terms of one supporting the other. They are separate.

15 DR. UFFEN: But...pardon me, Dr. Mustard, I invaded your question period...

DR. MUSTARD: You are just giving more questions.

DR. UFFEN: A few minutes ago you told us that some of the commissioners, not commissioners of appeal, some of the commissioners had come up through the Board staff...

20 THE WITNESS: That's right.

DR. UFFEN: ...and had subsequently been appointed by order-in-council, as commissioners.

Now, I would like to...maybe not right now...but illustrate such a routing which would avoid, or substantiate your point that they are completely separate.

25 At firsthand, I can't see how they could be regarded as completely separate, since they have had a career elsewhere in the Board structure.

THE WITNESS: I'm trying to follow your argument.

30 Are you assuming simply because they have had Board training that they continue to have allegiance or continue to have some sort of feelings of obligation to where they were trained?



5 DR. UFFEN: I would put it this way. There are two aspects of it. One of them would be by virtue of their career they would acquire habits, experiences, that would determine their future method of operation, largely affected by the fact that they have had a career within the Board.

The second point is, the public perception of that influence.

10 THE WITNESS: I have agreed with you wholeheartedly on the business of public perception. What I am disagreeing on is the way in which I see them operating. I see them completely independent and believing themselves to be completely independent, believing themselves to be in no way holding any allegiance to the group from which they came, or any requirement to support that group  
15 in terms of supporting their decision. I think they see themselves as independent, and act independent, and I say this very sincerely, that is how it has been operating since 1965...not just since...

20 DR. UFFEN: Do you mind my pursuing this, either by an example or in a general way, of how such a person - say, one of those commissioners - got recommended, which I believe you said earlier, to be a commissioner. Could they have come up through the medical?

THE WITNESS: They could have come from anywhere.

DR. UFFEN: Well, could you give me an example of one that, say, came up through the claims adjudication?

25 THE WITNESS: Yes. Tony Azzarello came up and was in fact the head of the claims adjudication branch prior to becoming a commissioner.

30 Larry O'Brien, who was a commissioner in that category, came up through the personnel department and had a training in law, had been a part of the appeal tribunal prior to 1965, and had learned adjudication processes in that.





DR. UFFEN: Just to tidy up my question then, who would have made the recommendations, and how would they have done it, that those chaps become commissioners?

THE WITNESS: Well, I think you are asking me directly. I was requested by the Minister of Labour of the day to suggest those kind of people who could complement, if you will, the kind of people who were going to be appointed from outside, who would have the knowledge and background to assist those people in becoming responsible commissioners and adjudicators in the claims process.

So it was a personal recommendation of my own and the chairman at the time.

DR. UFFEN: In response to...

THE WITNESS: In response to those two specific ones, if you wish.

DR. UFFEN: Thanks very much.

Dr. Mustard, I'm sorry.

DR. MUSTARD: No, that just allows me to further ask some questions on the subject.

The Board, or the commissioners of appeals, the people circled on that chart, and section seventy-nine of the Act says:

"The Board shall determine its own practice and procedure in relation to application, appeals and proceedings and may...", etc.

So the Board, by the Act, has power over the appeals procedure, the way it's worded. The Board is also responsible, as I read the Act, for the operation of the Workmen's Compensation Board as well.

So in a sense, the Board is carrying out two functions - it is overseeing the appeals procedure and it's overseeing the operation of the Workmen's Compensation Board. Is that correct?

THE WITNESS: That is correct, yes.



5 DR. MUSTARD: You see those as being two separate functions, and independent of each other, in the way the Board operates. The perception of the outside world, as you say, is that it's a homogeneous group at the top.

10 What would you feel about separating the appeals procedure completely out from under the Board...obviously it would require a reconstituting of the Board under the Act...but that the appeals procedure was actually independent of the board responsible for the operation of the Workmen's Compensation Board?

In other words, a decision made by the Board, or made by the Workmen's Compensation Board, could go to an appeal procedure staffed by people who were independent of your Board structure, and that decision would be binding.

15 THE WITNESS: I support that concept.

DR. DUPRE: And that is essentially the concept that the draft legislation tries to...

THE WITNESS: That's right. That's Weiler's recommendation.

20 DR. DUPRE: ...to develop.

One thing about the White Paper in this regard, and the draft legislation, on which I'm not clear, is the following:

25 I notice from...I, of course, duly note from reading the draft act, especially section six, which is the administration section, that the appeal tribunal is indeed completely separated from the Board.

30 But when I go to the early part of that same section six, or division six as it's called, of the draft act, I notice that of course the corporate board continues, but this time with a chairman, a vice-chairman of administration, not more than six directors - one of whom shall be the chairman of the appeals tribunal. So there is still some degree of overlapping on there.

If I remember Weiler's Green Paper, he did not





DR. DUPRE: (cont'd.) object to this kind of overlap.

THE WITNESS: I think it's on the contrary. It's  
5 not an objection, I think it's a stated preference. This is his  
recommendation that the three full-time members of the board should  
include the chairman of the appeals group as one of the three,  
and his logic or reason for doing that is that he believes that  
if that were not so, there would be a complete divorcing of policy  
10 develop over a very short period of time, and there is need to have  
some vein of consistency, or at least interrelationship, so that one  
would know what the other was doing.

He does not see that as in any way inhibiting the  
appeals group in changing policy or making different decisions.  
He simply sees it as a communications vehicle to make sure that the  
15 organizations don't get too far apart.

DR. DUPRE: I think you correctly outline Professor  
Weiler's stated preference, indeed.

Again, in that one, are your own views in accordance  
with that, that the chairman of the appeal tribunal should indeed  
be one of the directors?

20 THE WITNESS: I have to emphasize this is a personal  
position. I am not speaking for the Board.

DR. DUPRE: And I am listening to it as such, indeed.

THE WITNESS: I have already said that the public  
perception is a problem, and I think that the public perception  
25 will continue to be that there is an influence by the Board over  
the appeal group, if the organization were set up that way, and  
I think there should be a different way found to ensure that there  
is communications maintained.

But that's personal, and as you know the Weiler Report  
and the White Paper and the draft legislation are going to go before  
30 committee. I expect we will finally be asked as a board for opinions.  
We never have, to date, about any of these things. We have merely



THE WITNESS: (cont'd.) provided Professor Weiler with information, and I'm not sure what the Board's position will be, but that's certainly what I will say about it.

DR. DUPRE: Just while we're still on that particular part of the White Paper, just reading the draft legislation, there is one last thing I'm not clear on and you may know the answer right away.

I see the provision for the chairman, the vice-chairman of administration, up to six directors, and then, of course, one of them being the chairman of the appeals tribunal. Now, of course, that leaves up to five directors, and what I can't tell from reading the language of the draft legislation is whether those five directors must also be full-time, or whether they can be part-time.

THE WITNESS: The specific plan is that they should be part-time.

DR. DUPRE: And this, of course, I again see as a straight-out effort to try to disentangle, on the one hand, the policy setting for an agency...if you prefer, a Crown corporation... that administers a major self-financed scheme of workers compensation from the quasi-judicial role that is involved.

THE WITNESS: Exactly.

DR. UFFEN: May I ask you a supplementary on that? Do you, yourself, believe that that would be realistic, to have part-time board members, in view of the complexity of the organization, its size and so on?

THE WITNESS: Yes, I do. In fact, if it were not for the requirement to sit on appeals hearings, the commissioners of appeals would certainly find it very difficult to keep themselves busy on a full-time basis.

MR. LASKIN: Q. Is it contemplated that these five directors will perform the services of a director in the sense that one often sees in an ordinary corporation? That is, that





5 Q. (cont'd.) they will attend board meetings and oversee the board and give their advice and wisdom, but otherwise won't have any ongoing relationship with the day-to-day workings of the Board?

THE WITNESS: A. Yes. They would fulfill the normal role of directors in any organization, to bring their input as representing a segment of the community, in all of the issues of the day. We have, as you may know, a joint consultative committee...

10 Q. I was going to ask you about that.

A. ...which is a group of people who have probably similar backgrounds to the directors, but they are at a more junior level. They are not the more senior kind of top management, if you want to call it that, or top level advisors that a board, I think, needs to be seen to have advising them.

15 DR. UFFEN: Before you move to that, could I just tidy up one thing? The recommendation is not more than six directors, five excluding the...do you know why or where that would have come from and why it's not more than six?

20 My reason for asking this is, six is a rather small number if you are going to have a board of directors which tries to represent, or have representation on it, of the various aspects of public corporations.

Do you know why it's limited to six?

25 THE WITNESS: In my conversations with Paul Weiler, I think his motivation was to keep it down to the minimum realistic number that could be expected to in fact participate, and I believe he feels that you can get the different interest areas covered by six people.

Now, I can see your argument. Perhaps you need eight, and I don't think that's a hidebound recommendation.

30 But his basic motivation was to keep it workable.

DR. UFFEN: What would be your own opinion, from



DR. UFFEN: (cont'd.) your experience? Do you think that this can be managed with just six directors...with the regions of Ontario and the various kinds of vested interests and so on, that are legitimate?

THE WITNESS: That's rather difficult to answer, frankly. I didn't...more or less...let's put it this way, when Weiler was asking for my own personal thoughts, like I emphasized - the Board had never been asked for any position - but I had direct experience with the joint consultative committee, which Mr. Laskin was going to come back and talk about, and it was a little larger group than six.

I was chairman of that committee in its early stages, just to get it off the ground, and we then asked them to appoint their own chairman.

It's very difficult to get consensus among the various interest groups, and the larger the number that you get, the less likelihood of getting consensus.

I guess I would have to answer that I think it could be made to work with six.

MR. LASKIN: Q. This joint consultative committee that you spoke of, this is the one, I take it, provided for in section seventy-one, subsection three (h) of the Statute?

THE WITNESS: A. Right.

Q. It came into effect when?

A. About 1973. Shortly after the Statute was changed in 1972.

Q. Is it still operative?

A. Still operative.

Q. What role does it perform?

A. The Board regularly refers to it any issue that they feel is controversial, and asks for their input and recommendations - legislative experience rating, for example,





A. (cont'd.) disclosure - all of these matters were asked to be commented on by that group.

5 Q. Can you tell us a little bit about the group?  
Who is on it? How many people are there? How often does it meet?

A. It meets monthly, even during the summer months most years, although there has been the odd exception.

10 I may forget the odd individual, for which you will forgive me, but the labour representatives are John Stephanini, Gilchrist; from the Railway Brotherhood...I'll get you the name, that one is gone for the moment; we have two ladies representing the public sector - Mrs. Jennings and Mrs. Calhoun; we have from industry, up until recently it was the head of the Ontario division of the OMA, Doug Keene; and a representative from the construction industry. Those essentially are the people.

15 Q. So there's six or seven?

A. There's about seven or eight people.

Q. Seven or eight.

20 DR. DUPRE: And this joint consultative committee was brought into being in what year?

THE WITNESS: 1973.

25 MR. LASKIN: Q. Then, I take it, it meets monthly and meets to consider any matters that may be referred to it by the Board?

THE WITNESS: A. Anything that is referred to it by the Board, and it is completely free to introduce any subjects of its own volition.

30 DR. DUPRE: Can I just understand the use of the particular words within the title - joint consultative committee? This suggests to me an intentional attempt to create a tripartite consultative committee, being government, industry, labour. Is that correct?

THE WITNESS: No. The public, industry and labour.



DR. DUPRE: I see. The public, industry and labour.

THE WITNESS: There are no government members.

5 MR. LASKIN: Q. What lay behind the establishment of this committee?

THE WITNESS: A. It was one of the recommendations of the task force carried out by the government in 1972. They recommended that such a committee should be formed to give the Board the advice of the various interest groups.

10 Q. In your experience has the Board sought the advice of this committee?

A. In every case where there was any impact on those groups, without exception.

15 Q. Can you tell us what kinds of issues would you be seeking the advice of this committee on?

A. Well, each one of the legislative changes that were being considered, the benefit changes that have taken place since 1973, were reviewed by them. I mentioned earlier they have made a number of investigations and reports on experience rating. They gave specific advice to the Board on disclosure...

20 Q. Disclosure? Access to records?

A. Access to records. They gave advice to the Board on the creation of area offices, those kinds of things.

Q. Has the Board acted on the recommendations of the committee from time to time?

25 A. We have never rejected their advice.

Q. You have never rejected their advice?

A. No. But I emphasized earlier, the most you can get in that kind of environment is consensus. You can't get unanimity of opinion. I don't want to be misunderstood. Individuals will come to a consensus in that environment, and then of course when they go back into their own environment will still feel free to be critical, and that I think is to be expected.

30





DR. DUPRE: Has the joint consultative committee also advised the Board on any of the industrial disease guidelines?

5 THE WITNESS: Thank you for reminding me of that. There are two other members whom I didn't mention. Ed Waddell is a member of that committee, and Dr. Mastromatteo is also a member of the committee, and he, as chairman of a subcommittee with that committee, has been asked to comment to on guidelines.

10 DR. DUPRE: I see. Mr. Waddell is the third, if you will, labour member of the joint committee?

THE WITNESS: The third labour member.

DR. DUPRE: And Dr. Mastromatteo is the third industrial?

15 THE WITNESS: Well, when he was appointed to the committee he was not in his current position with International Nickel. He was still in the governmental field. He subsequently became, I suppose, more of a management rep, but that was not the way in which he was originally appointed and we don't consider him in that category.

20 MR. LASKIN: Q. Do you recall whether that committee commented specifically on the asbestos-related guideline?

THE WITNESS: A. I would have to check the record.

Q. Could you do that?

A. I would expect they have had the opportunity to review them from time to time. Whether or not they have officially given a position on it, I can't answer for the moment.

25 Q. If there is some written position on it from that committee, could you make that available to the Commission?

A. Yes, I can.

DR. DUPRE: Please, Dr. Uffen.

30 DR. UFFEN: Just a tidying up question again, about the operation and joint control of the committee.

They are appointed by the Board?



THE WITNESS: They are recommended by the Board for appointment by the Lieutenant-Governor in Council.

5 DR. UFFEN: Okay, thanks. That's important.  
For any specified period?

THE WITNESS: It's government practice to appoint people for a maximum of five years, in practice, but normally for three years. The current situation is that, as you are aware, a number of groups were looked at under a Sunshine Law provision. the joint consultative committee was one of those groups which was looked at, keeping in mind the proposed legislation that is being considered.

10 As it stands now, all of the members have a one-year appointment which will expire some time during the calendar year 1983, and whether or not they are reappointed will be dependent on whether or not there is any change in the composition of the corporate board and whether or not the draft bill and act proceed.

15 DR. UFFEN: Do they receive an honorarium, as distinct from a salary?

THE WITNESS: They receive an amount per day for attendance, plus expenses.

20 MR. LASKIN: Q. I just want to make sure I understand your answer to Dr. Uffen as to who appoints the members.

THE WITNESS: A. The Board, in fact, asked various groups for nominations to represent them. Having obtained those nominations, we then recommended those names to the Lieutenant-Governor in Council, they were appointed by order-in-council.

25 DR. DUPRE: As I read the Act, the impression I get from glancing at seventy-one, three (h) is that there is no obligation on the WCB to ask the Lieutenant-Governor to appoint the members, is there?

30 THE WITNESS: It says, "establish with the approval of the Lieutenant-Governor in Council."





DR. DUPRE: Right. To establish the committee with the approval of the Lieutenant-Governor in Council, but not to  
5 appoint the members with the approval of the Lieutenant-Governor in Council.

THE WITNESS: Traditionally and consistently throughout the Act, where the phrase 'with the approval of the Lieutenant-Governor in Council' is stated, there has always been an order-in-council backing that up in practice.

10 Our general counsel is here. He can agree if that's so.

MR. RIDDELL: That's correct.

DR. DUPRE: In other words, the words 'establish the joint consultative committee' are understood in terms not only of establishing through an order-in-council that there shall exist  
15 such a committee, but in addition through an order-in-council providing for the staffing of that committee from time to time?

MR. RIDDELL: That's the way in which we interpret this.

DR. UFFEN: Now are there...am I getting ahead of  
20 you? Are there specified terms of reference for the joint consultative committee, or do they draw up their own, or are they unspecified?

THE WITNESS: The answer is yes to both questions. There is and they were involved in the development of their terms of reference and procedures. I would be happy to give you copies  
25 of that.

MR. LASKIN: Q. Could you do that? That would be helpful, Mr. MacDonald.

THE WITNESS: A. Yes.

DR. UFFEN: By the way, did we establish who chairs  
30 it? Who calls the meetings?

THE WITNESS: When they were first appointed, I chaired



THE WITNESS: (cont'd.) it for a period of about a year and a half. At that time they appointed their own chairman from within their group.

I attend to give information and respond to questions, on request. I do not attend routinely. One of our employees acts as their secretary and keeps their records.

DR. UFFEN: I think that's sufficient.

DR. DUPRE: Now, coming back to tidy up the industrial disease guidelines, when I raised that point with you, you indeed stated that yes, the committee does consider industrial disease guidelines from time to time, but you also mentioned, I think, that they do that through a subcommittee?

THE WITNESS: Quite often in practice, rather than the full committee dealing with a subject in the first instance, they will form a subcommittee to study and report back to the full committee. But the full committee always puts its mind to bear on the recommendations that are made to the Board.

DR. DUPRE: And such subcommittees would simply be created ad hoc by the committee, to suit its convenience?

THE WITNESS: Yes. My reference was to the fact that because of his expertise, Dr. Mastromatteo always chaired the subcommittees that may have dealt with guidelines.

DR. UFFEN: What relation, if any, would that subcommittee have with the permanent staff of the industrial disease section, the medical people down in...would they be consulted? The chest specialists?

THE WITNESS: Any of our administrative resources and staff are available for consultation and advice, to the joint consultative committee, and in fact in the subcommittees, staff individuals have always been called to give evidence, if you will, or give information to the subcommittee, or to the full committee.

DR. UFFEN: I just want to make sure, because I'm





5 DR. UFFEN: (cont'd.) worried about this perception problem that you have mentioned yourself, and if the subcommittee call upon the medical people from within the structure to advise them on guidelines, which these same people are going to implement and then these same people are then called upon by the appeals group from time to time, the perception of who is doing things gets a bit cloudy.

10 Have I put my finger on something? Is this a possibility?

THE WITNESS: There is no doubt that the public perception is that people, regardless of how expert they may be, if they seem to be attached to an organization, their objectivity, in the public eye, is questioned.

15 Let's just look, as an example, let's look at Dr. Mastromatteo. Let's look at his career.

He came up through the department of health, department of labour, and was a recognized expert in all of these fields.

20 He moves along from there to the...he takes an appointment over in Geneva, he comes back, he comes in the public sector. In each one of those environments, if you will, he is looked on differently, if that can give you the point I'm making.

25 But my own belief is that regardless of all of this what we have always done in getting advice as an organization, was to find the best advice available - wherever it may be.

30 DR. UFFEN: The thing that I would see is that there are many industrial health problems, and you go to various experts for maybe toxic chemicals, and the one that interests us about asbestos, is it possible that the advice always keeps coming from the same one or two individuals?

THE WITNESS: I have read what has been said by



5 THE WITNESS: (cont'd.) Peter Barth about this, and I know what in fact the practice has been internally, and I suppose the number of experts in that field are fewer than in some of the other fields...if that's really what you are saying.

That appears to be the evidence all right.

DR. MUSTARD: Can I get in on this a little bit?

10 Weiler, in his document, goes into this problem fairly extensively, and perhaps you might discuss just a little bit about how you handle the problem of physician/expert, who still is faced with enormous uncertainty in medicine, in the reading of x-rays, etc. We know that our precision is not as great as we might like to have you believe. There is an uncertainty aspect in it.

15 Well, I can testify to studies which have been done taking ten chest physicians or ten radiologists expert in reading chest x-rays, and having them read a hundred x-rays ten times, blind, and the variation within themselves in the readings, and the variations among themselves.

20 That uncertainty question, it seems to me, is an extremely important problem in trying to resolve claims, etc. How do you handle a decision-making function of the medical expert who gives an opinion, and you can get another expert to give another opinion, and you get another expert to give another opinion...in other words, you can get the full spectrum of variation if you draw in enough people...and it also depends how you define expert  
25 when you play the game, but you can get enough variation.

30 Then the judgement has to be made as to within that range what is the right kind of decision, and I guess my question is, do you still leave that largely in the hands of your own experts in terms of making that judgement, or do you pull it out sufficiently into the...I hate to say this openly, publicly, but into the hands of the broader judgement of the legal mind which has



DR. MUSTARD: (cont'd.) greater capacity, or the nonmedical expert, to make a judgement decision on the uncertainty area?

THE WITNESS: I'm in the very happy position that if you look at the Statute, I am barred from making decisions on claims. I have never made a claims decision in my thirty-seven years at the Board. Even in the appeals situation, I can't sit on an appeal.

You have heard from our medical people what they do and how they do it. You have heard from John McDonald how his adjudicators deal with this matter, and I find it very difficult now to superimpose my own judgement on the points that you are raising.

As I see it, what all these people are required to do is to take the evidence that has come to them, take the qualifications of the experts that are involved in giving that evidence, and then make a choice from that decision as to what, based on the balance of probabilities, they should do.

It's very difficult, if not impossible, in the field of industrial disease to explain to the layperson, the widow, if you will, the choice where you made on a very borderline case between the two situations. One of the things that you have heard about and one of the things that was said by our new chairman when he was first appointed, and I encouraged him to make this comment, in the Hay Report it refers in a general way to that very terribly difficult, almost impossible position the Board is put in in industrial disease cases to decide which cancer is in and which cancer is out.

There's only two solutions to that, as I see it. One is to have a partial cause provision put into the Statute, which says if there is any industrial exposure at all you have certain rights in terms of allowing all or a portion of the claim,





THE WITNESS: (cont'd.) even though it doesn't fulfill the full criteria of latency periods and exposure periods.

5 Or, and I suspect this will be the route that Professor Weiler will finally go, you have to say that for industrial disease...and this may be a contradiction of what was done in South Africa...but for industrial disease the province needs a program to cover everyone, so you have a way of allotting a case one place or the other.

10 It would be wrong, in my judgement, to say that industry is responsible for everything and just make an automatic presumption.

DR. MUSTARD: Can I just go back to the current system and raise what I think came up in the testimony we have had so far?

15 It's a question of who defines who is a suitable expert. The impression I have from the testimony..and you can always check the transcript to check for accuracy in terms of interpretation... is that when an appeal gets up to the highest levels of decision making in the structure of the Board, if there is expert testimony from within the Board's advisory machinery, and the appellant 20 has expert testimony from someone who is considered to be of equal stature, that the benefit of the doubt would then go to the person making the appeal...if there is a difference of opinion on it.

25 But if the advisor to the person making the appeal is not considered to be of equivalent stature to the advisor to the Board, the decision will go the other way.

30 The real question is, have you ever given any thought to the problem of who defines who is the expert of sufficient stature to be serving the person who makes the appeal, because I know my profession well and we have varying ways we define who is an acceptable peer that we will debate with, and



5 DR. MUSTARD: (cont'd.) the impression I have is that that decision still is made from within the Board structure, not made by a more neutral group, and I may be wrong in my perception about that, and if I am I would like to be corrected.

If I am right, have you ever given any thought as to how you could get that taken outside of the Board definition of who is an equal expert?

10 THE WITNESS: I understand the problem perfectly, Dr. Mustard. The Board does, within its own organization, make that decision as to the caliber, if you will, of the medical evidence on which it's going to make its decision, and yes, we have given consideration to doing that, or to recommending that that should be done externally.

15 It is, in fact, one of the recommendations of Professor Weiler in his draft legislation. It does call for every difficult medical problem, not just in industrial disease, but in everything, to be dealt with by medical panels.

I think that would be a very useful way to deal with it.

20 As long as we seem to be doing it internally, it will be, for the reasons we have talked about earlier, suspect.

25 DR. DUPRE: I wonder if I can just go over that same ground again, Mr. MacDonald, with respect to just how the present guidelines are helping. I take it from earlier on in your testimony that there really has been a deliberate policy decision to use guidelines as distinct from schedule three, that goes back to the 1940's.

THE WITNESS: Right.

30 DR. DUPRE: Now, from what you say I can certainly understand the rationale that would give some appeal to that way of proceeding. Among other things, it keeps this book as small





5 DR. DUPRE: (cont'd.) as it is, because if all of the guidelines were in schedule three, it would expand enormously.. might, for that matter, even have to require a looseleaf format, so on and so forth.

10 But at this point, and I'm always bearing in mind here that I'm looking at a policy decision made almost forty years ago, thirty or forty years ago, at this point I'm reminded that the Act still attaches one important aspect to schedule three, and this is what we find in section one twenty-two, nine, where of course, it appears that indeed the utility of section three, of schedule three and why it is there, is that it, of course, sets up a strong presumption in favor of the employee.

Now, you agree with what I've just said?

15 THE WITNESS: Yes, I do.

DR. DUPRE: Now, bearing in mind this conscious policy decision that goes back to the forties, and of course the fact that the guidelines have since been developed, I start to ask myself well, what is the purpose of the guideline.

20 Now, at this stage what I want to share with you, Mr. MacDonald, is that I have no pretension to knowing anything about the guidelines, save for guidelines that exist with respect to asbestos-related diseases, and which Professor Barth discusses in his chapter five.

25 Now, can I put this impression to you and just ask you to comment on it any way you want? It appears to me, when all is said and done, that if I look at the mesothelioma guideline, that one essentially does the sort of thing that section one twenty-two, nine seems to look to schedule three to do - namely, to set up a very strong presumption in favor of the employee.

30 Indeed, I would say from what I understand about the mesothelioma guidelines, that if anything it sets up an even stronger presumption in favor of the employee than one twenty-two,



5 DR. DUPRE: (cont'd.) nine, because it's almost an irrebuttable presumption as opposed to the rebuttable presumption in one twenty-two, nine, the moment you have established exposure.

Then when I look at the other guidelines...I'm thinking about the lung cancer guideline, the gastrointestinal guideline, the laryngeal guideline...I just want to share with you that I'm not sure what I'm looking at there.

10 In other words, I am not sure if I am looking at something that sets up one twenty-two, nine style, a rebuttable presumption in favor of the employee; or whether instead I am looking at a set of eligibility criteria. I'm not entirely certain, given, of course, the fact, as you so rightly point out, that notwithstanding the guidelines each case will be looked at on its merits, I'm not exactly sure what purpose those guidelines  
15 serve.

That's the question.

THE WITNESS: May I ask a question first?

DR. DUPRE: Please.

20 THE WITNESS: Have you had an opportunity to read what Dr. McCracken had to say about the guidelines and about Professor Barth's comments about them?

DR. DUPRE: Yes. I read it last night and this morning, as a matter of fact.

25 THE WITNESS: Essentially what he says as it relates to minimum exposure periods and latency periods, is that if you look at the statistical spread and the deviation and whatever, we erred on the generous side in establishing the guideline.

30 To the extent that that is so, and as I have already said, because of our emphasis on the escape clause, dealing with each case on its own merits, we are trying to lean over backwards, in practice, in order to be able to allow a claim.





THE WITNESS: (cont'd.) There's absolutely no Brownie points for the Board in ever rejecting a claim, and I frankly regret that we ever have to because it only makes difficulty for us. But the legislation requires us to make a judgement as to what is industry oriented and what is not.

So I think you are right, that the guidelines don't give the kind of automatic rights that flow in mesothelioma, by reason of that guideline or in the general one, twenty-two, nine situation or in the schedule three relationship of industrial process and product.

But on the other hand, the guidelines have been set up in a very generous way to make sure that we err on the side of generosity.

DR. DUPRE: Let me just repeat my own understanding at this point, to check it out, because it's important to me whether or not I have this straight.

The way I would put it, Mr. MacDonald, is that I can see a strong rationale for going to a guideline approach as distinct from a schedule three approach, for some of the reasons you mentioned.

But at this point what I have to bear in mind is that if that is what you are going to do, you have to bear in mind that the Act, one, twenty-two, nine in particular, remains important. And at this point the way I see the manner in which guidelines have evolved, there are some guidelines...and I will take the mesothelioma one as a case in point...that quite closely attempt to achieve for this disease what one, twenty-two, nine - see schedule three - has achieved.

THE WITNESS: Exactly.

DR. DUPRE: Then there are other guidelines that aren't the same kind of guidelines, that aren't schedule three substitute guidelines. Is that a fair way of summing up?





THE WITNESS: Yes, it is. It's a question of...

5 DR. DUPRE: The examples of those that are not substitute-for-schedule-three guidelines would be the lung cancer, the laryngeal, the GI, I suppose the asbestos fiber dust effect guidelines as well. Is that correct?

10 THE WITNESS: Yes, I would say so. And that's essentially because there is no scientific evidence that the only source of those diseases is the industrial process.

15 DR. DUPRE: Now, could I just perhaps, in terms of cleaning up something at this juncture, address Professor Barth's own chapter five, and I now take this chapter as already corrected, incidentally, not only by testimony that we have had from some of your WCB colleagues, but by the critique of Professor Barth that was produced by Dr. McCracken.

20 However, the point that I'm after now, if I read chapter five, would be: Did Barth, who never refers, if I remember rightly, to the joint consultative committee, did he miss something in that the joint consultative committee was in fact involved in the development of any of the guidelines that he refers to, namely the asbestos fiber dust effect guidelines, the mesothelioma guidelines, the lung cancer guidelines, the GI cancer guidelines... these are all 1976 guidelines, if I remember right...and then the laryngeal cancer guideline of 1978? None of these ever went to the joint consultative committee?

25 THE WITNESS: Some of them did, not all of them.

DR. DUPRE: Oh, some of them did?

THE WITNESS: Some of them did.

DR. DUPRE: Okay. In that, of course, he doesn't seem to note that. Will it be possible for you to communicate to us which did and which didn't?

30 THE WITNESS: Yes. I have already agreed to do that.

DR. DUPRE: All right.



5 DR. MUSTARD: Just to make sure the other aspect of that, just to follow through, any comments they made about those guidelines and what action was taken by the Board if they did comment.

THE WITNESS: That's agreed, yes.

MR. LASKIN: Q. Can I just perhaps follow up on the Chairman's questions on this subject and perhaps complete them?

10 It really gets back to the difficulty I'm having with the guidelines, and that is trying to ascertain really for whose benefit those guidelines are in place, and I'll put to you what my problem is.

15 If I'm a member of the work force and I want to know what my rights are vis a vis the Workmen's Compensation Board, in the event that I get some kind of disease, of course if I have the disease set out in schedule three, and a process beside it and so on, of course I can go to the bookstore and I can get a copy of the Statute and I can look at it, and see that it's there, and not only see that it's there, relate it back to section one,  
20 twenty-two, subsection nine and thereby know that I'm going to be compensated unless the employer can come forward and demonstrate that I shouldn't be.

In other words, I've basically got an onus of proof working in my favor, to use the legal terminology.

25 When you have the guidelines in place, number one, of course, you don't have the benefit, necessarily, of going to the government bookstore and buying this document. And number two, I'm not entirely certain you are in the same position with respect to the onus...even in respect of mesothelioma where admittedly, and we've heard the evidence and I accept the evidence, that any case  
30 in which there has been mesothelioma found - no matter what the exposure - it has been compensated...but the guidelines themselves





MR. LASKIN: Q. (cont'd.) don't say that.

5 My problem is, I'm not sure that the employee is really in the same position with respect to the onus of proof.

THE WITNESS: A. Dealing with your first point - that is whether or not in the government bookstore there is information that gives you background as to how the cases can be dealt with - my understanding is that the guidelines are included in the material which is in the government bookstore, as it relates to the background material from which the claims people adjudicate.

So the guidelines are there. They are public documents.

Q. They are part of that big volume...

A. Yeah, but they are there.

15 There is an edition, and I don't know whether Dr. McCracken talked about it, there is a booklet on industrial disease ....has it been referred to earlier in the testimony?

DR. DYER: I don't believe it has. No.

THE WITNESS: It was developed to try to give the general public the kind of information that they needed in order to deal with industrial disease, and I think I'll simply say that it should be tabled and we should look at that, and perhaps it will help you to see whether or not in your judgement we have communicated sufficiently.

25 I'm really not going to quarrel as to how well we have communicated, because I understand it's difficult to get at and it's hard for a layperson to read.

However, dealing with onus of proof, I believe that, for the reasons I have indicated earlier in my testimony, in setting the guidelines in the first instance we have erred on the side of generosity in terms of exposure periods, etc., and I believe in practice, as I said, the whole Board system is an inquiry system.



THE WITNESS: (cont'd.) At every level of adjudication, people are instructed that it is their duty to get the information they need on which to make a decision. They can't just rely on what is presented to them, and that the name of the game, at all levels including the appeals system, is to lean over backwards to find a reason to allow.

Again, of course, there is a section that permits that.

One of the things that strikes me in reading Barth, and on all of this evidence with the possible exception of what the former chairman in British Columbia said in his comment about Barth, the low level of appeal activity is somehow or other seen to be evidence that the information isn't there - the public doesn't know that they have these rights.

There is another interpretation that can be placed on that, you know, and that is simply that people were aware and chose not to exercise those rights because they didn't feel they had cause to do so.

MR. LASKIN: Q. Can I just...and I take your point and I also take your point in terms of the generosity or liberality with which the Board has indeed approached these questions, and I'm just wondering whether again it may not be simply a matter of public perception.

Let's take lung cancer. Unlike mesothelioma, to a large extent, of course...and you've made the point...lung cancer is not necessarily associated with any particular industrial process, but nonetheless there is evidence that it is associated with asbestos.

I'm just wondering whether you would see any downside to putting lung cancer into a schedule like schedule three, and putting asbestos opposite it, which would, to my way of thinking, only say that if an asbestos worker contracts lung



Q. (cont'd.) cancer, then he is going to be compensated, unless somebody can come forward and demonstrate that it isn't work related.

Of the two people that are able to demonstrate whether it's work related or not work related, I would have thought the employer is in a better position to do that and therefore should have the onus to disprove or to put forward evidence which would disentitle the claimant to compensation.

THE WITNESS: A. Frankly, Mr. Laskin, I don't consider myself enough of an expert to comment on whether or not that is a logical assumption - that you must say that if you have asbestosis, lung cancer is automatically allowable.

If I recall, in Dr. McCracken's comments with reference to Barth he does refer to this matter and he does suggest that there is no...in his judgement...I'm giving his opinion and I'm not saying I subscribe to it, I'm just simply commenting on what I think he said - that there was no way you could automatically presume that.

Am I correct in that?

MR. RIDDELL: Yes, that's right.

DR. UFFEN: There's one thing maybe Dr. McCracken has dealt with, but I would like to ask you, and it again deals with perception.

So I would like to ask you this question and find out whether what Dr. Barth has said is correct or not.

If anybody wants to follow it, it's the development of the guidelines on page five, twelve of Barth.

He's talking about the establishment of the guidelines, and he says:

"A subcommittee of the Board's management committee was formed to establish guidelines for lung cancer and mesotheliomas in asbestos workers."





5 DR. UFFEN: (cont'd.) "The subcommittee consisted entirely of staff drawn from the claims services division, the appeals system and the medical services division."

There's two parts to this. First of all, what is the Board's management committee, and secondly, is that statement correct?

10 THE WITNESS: The statement is correct.

The Board's management committee consists of all of the executive directors of the various administrative functions, and I am the chairman of that committee.

15 Also on the committee, ex officio, is the registrar of appeals, the internal auditor, the executive co-ordinator of research and development, and a number of other people who have equivalent status to executive directors but are not voting members and don't in fact manage an operating division.

20 They deal with all policy matters and all routine things that are to be changed before they come to the Board for consideration. In this case, as a practical solution to developing guidelines, the executive director of claims, the executive director of medical services, the registrar of appeals were the main members of the committee, who then drew staff from their respective organizations, to develop the guidelines.

DR. UFFEN: Thank you.

25 MR. LASKIN: I wonder if we should give our witness a brief respite, Mr. Chairman, and might it be a convenient time to adjourn for fifteen minutes?

DR. DUPRE: We'll rise for fifteen minutes.

THE INQUIRY RECESSED

30 - - - - -



THE INQUIRY RESUMED

5

DR. DUPRE: Now, if we may resume.

First of all, just a couple of tidying up points, if I might, Mr. MacDonald.

10

Just before we broke for coffee, in response to Dr. Uffen's question, you very usefully vouched for the accuracy of what Professor Barth points out at the bottom of page five, twelve, which was that it was the Board's management committee that did indeed form a subcommittee to establish guidelines.

Now, over on page five, thirteen - just to make sure you have the end of that story - could I ask you to...for your view of the accuracy of what Professor Barth says there?

15

He says, on page five, thirteen:

"The guidelines for mesotheliomas and lung cancer were recommended from the subcommittee back to the WCB's management committee".

That's true, is it?

20

THE WITNESS: Yes, that is true.

DR. DUPRE: And from there, made official by approval of the corporate board in April, 1976.

THE WITNESS: Correct.

25

DR. DUPRE: Can I just ask you something? How does a recommendation that is adopted by the management committee get communicated to the corporate board for the corporate board's approval or otherwise?

THE WITNESS: It is transmitted by the management committee to the secretary of the board, and appears on the agenda of the next corporate board meeting.

30

DR. DUPRE: And it is you, as chairman of the management committee, who communicates that to the secretary of the board, is that correct? Or does the management committee have





DR. DUPRE: (cont'd.) its own secretary?

THE WITNESS: The management committee has its own secretary, and it is that secretary that communicates it.

DR. DUPRE: I see. Is the secretary of the management committee himself one of the executive directors, or is it someone who is specifically given that job?

THE WITNESS: The secretary of the management committee is also the secretary of the board. He is not an executive director, but he is considered the equivalent of an executive director.

DR. DUPRE: Could you just roll that past me again? The secretary of the management committee is...?

THE WITNESS: Acts as the secretary...is in fact the secretary to the board.

DR. DUPRE: Oh, I see. The secretary of the board and the secretary of the management committee are one and the same person?

THE WITNESS: One and the same person.

DR. DUPRE: So he just communicates it to himself.

THE WITNESS: That's right.

DR. DUPRE: Okay.

DR. UFFEN: Who is it, by the way, just so that we...?

THE WITNESS: Alec Yoma, Y O M A, at the moment. Joma. I'm sorry. Joma, yes.

DR. DUPRE: It is he who replaced Mr. John McDonald?

THE WITNESS: That is correct.

DR. DUPRE: Mr. John McDonald was the secretary of the board and of the management committee at the time that Professor Barth is describing?

THE WITNESS: Yes, he was.

DR. DUPRE: The other area that just in terms of cleaning up, that I was interested in, takes me back to the joint



DR. DUPRE: (cont'd.) consultative committee.

Now, may I ask you there, when the joint  
5 consultative committee formulates its advice to the corporate  
board, is this advice formulated in writing?

THE WITNESS: Yes, it is.

DR. DUPRE: How is that communicated to the board?

THE WITNESS: It is transmitted by the secretary  
of that committee to the secretary of the board.

10 DR. DUPRE: Is the secretary of the joint  
consultative committee a different person from the secretary of  
the board?

THE WITNESS: He is the assistant secretary of the  
board, and he is a different person, yes.

15 DR. UFFEN: In trying to understand the organizational  
structure and so on, and gradually getting through it, I had  
missed the management committee in the previous testimony, and I  
wonder whether you could take a few minutes to describe the  
management committee, how it came to be, who appoints it, what  
its main functions are, how often it meets, what does it deal with  
20 and so on.

THE WITNESS: The management committee, or a form  
of it, has existed since 1965. The current management committee  
was formed after the change in the Act, of 1972. It consists of  
the executive directors in charge of each of the administrative  
divisions of the board, and in addition, ex officio members are  
25 the secretary of the board, the actuary of the board, the general  
counsel of the board, the executive co-ordinator of research and  
development, the registrar of appeals, and more recently one  
other individual - the executive co-ordinator of regional operations.

They are nonvoting members, the last group.

30 By a delegation of authority document, which as a  
matter of interest was just revised yesterday, by the Board, their



5 THE WITNESS: (cont'd.) duties are prescribed, their authority in terms of budgets and dollars are prescribed, and they in fact deal with every practice and procedure of the Board, and every change that is going to be made passes through that committee for its consideration and advice to the Board.

DR. UFFEN: If I may make an interruption here, the changes that were made yesterday, as you mentioned, were they changes or were they formalization of previous practices?

10 THE WITNESS: They were cosmetic changes arising out of a need to change dollar limits of authority, to recognize more recent organizations and creation of new positions which had occurred in the recent past.

DR. UFFEN: Could you make available to us a copy of the original Board authorization, as well as the recent change?

15 THE WITNESS: Yes, I can. Yes.

There is essentially no change other than cosmetic ones.

DR. UFFEN: I interrupted you. Would you continue to describe its functions?

20 THE WITNESS: I believe I have given you a capsule comment of its functions. It in fact will deal with any program change that is to be considered in any of the operating divisions. It is not possible for an operating department to change its practices or procedures without having full consideration by the management committee.

25 DR. UFFEN: Including the appeals?

THE WITNESS: They have the opportunity to attend and do attend most of its meetings.

DR. UFFEN: But are their procedures subject to the scrutiny and study of the management committee?

30 THE WITNESS: No, we never have been.

DR. UFFEN: Is that in the delegated authority explicitly? Or has it come about by practice?





5 THE WITNESS: I don't believe it explicitly states that they shall not deal with appeal procedures, but it certainly has been the practice and it would be quite improper for appeals procedures to be vetted in any way by the management committee.

DR. UFFEN: Does the management committee have a role in promotions, remuneration policy?

10 THE WITNESS: Not as a committee. Each of the... would you restate your question? You said policy.

DR. UFFEN: I included two things. Promotions and remuneration policy, as distinct from individual promotions.

15 THE WITNESS: Yes. The management committee would, in the sense that the human relations divisions, which is one of the divisions, if they want to revise any of their procedures, which would include evaluation of jobs, remuneration of jobs, salary ranges, when they wish to make changes in those they would be brought to the management committee for their consideration and approval.

20 DR. UFFEN: You outlined a number of people. I didn't quite grasp it. But when they are all there, approximately how many people are you chairing?

THE WITNESS: When they are all there, about fifteen.

25 DR. UFFEN: Does it have subcommittees that deal with certain aspects of the work and then report to your management committee?

30 THE WITNESS: There are no standing subcommittees, but on an ad hoc basis, as in the case of the guidelines, we do form subcommittees of the management committee in the same way as we did in the joint consultative committee, to deal with matters where expertise is required, to bring back to the total committee.

DR. UFFEN: Does the management committee meet regularly?



THE WITNESS: It meets twice a month, on the first and third Wednesdays of the month, and it meets informally every  
5 Wednesday of the month to keep communications alive.

DR. UFFEN: Would these be brief meetings, or is it an all-day meeting?

THE WITNESS: They are all morning and into the afternoon, many times.

10 DR. UFFEN: With a formal agenda?

THE WITNESS: With a formal agenda.

DR. UFFEN: Are position papers presented? You know what I mean by the term position papers? Somebody has a proposal and it comes forward and it gets examined and discussed?

15 THE WITNESS: Absolutely. There are position papers prepared on every subject where there is going to be a change in a program or a policy.

DR. UFFEN: Are there records of decisions kept? Minutes?

20 THE WITNESS: There are minutes of every meeting, yes.

DR. UFFEN: Do those minutes go to the WCB itself, the corporate board?

25 THE WITNESS: The backup material which is to be considered in the meeting and minutes of the actual meeting are distributed to all of the corporate board members, in advance of the meeting. Well, in advance of the meeting in the case of the material, and following the meeting after the decision has taken place, and then of course any decision which requires action by the board is taken as we have described, by the secretary to the Board, to their next regular meeting.

30 DR. UFFEN: I'm curious about another thing now, aside from policy. The actual decisions about promotions...I'll





5 DR. UFFEN: (cont'd.) put it this way...one time I was involved in an operation which had a very similar structure to this, and in order to see that there were fairness about promotions, we had a special committee that vetted the promotion recommendations.

Now, this was not policy, this was the actual assessment of individuals. Do you have anything similar?

THE WITNESS: Yes, we do.

10 DR. UFFEN: How does it operate?

THE WITNESS: Well, the basic philosophy that the Board operates on in terms of promotion is that it's an open competition in every situation. There is no way in which an executive director can appoint. He must post the position. All of the eligible people must be considered and the most qualified person is selected.

15 We have a grievance procedure that permits anyone to grieve if they feel that they have not been fairly dealt with in that process, and that pertains not just to the union positions, but also to the management positions as well, and it is used on an active basis.

20 DR. UFFEN: Does that particular committee have a name, and where does it fit in the structure? If it's not part of the management committee, where does it fit?

25 THE WITNESS: In the first instance a grievance must...the grievance procedure is very clearly spelled out, set out, and it stipulates that the immediate supervisor deals with the matter first, and then it can proceed to the next level of management, and finally to myself as vice-chairman. There is mechanisms beyond that. It could go to the public service grievance area as well, if it wishes.

30 I perhaps misled you in suggesting that there was a formal committee to deal with promotions per se. On occasion, if you have a special situation that needs to be reviewed by a



THE WITNESS: (cont'd.) management group, that could be done. But that's not done very routinely. Most often it's a very clear cut situation that the person who is most qualified is accepted by everyone, and we rely on the grievance procedure to deal with the matter.

DR. UFFEN: I'll make an observation. I found it more logical that a promotions policy and promotions would be part of a management board's activities. I'm surprised that it's not part of the management board's activities.

Is there any explanation, or...?

THE WITNESS: In practice, it really hasn't been necessary for that kind of peer review to take place as it relates to promotions.

Now, what does happen and what has happened quite often, is that the allocation of the value of a job is a matter of some discussion and disagreement, and in those cases, while we have a committee that deals with job evaluation of the job itself, there is provision and there is regular situations in which that particular review is further reviewed by the management committee. So it's quite common to have the management committee deal with the evaluation of a position, but most uncommon to deal with the actual appointment of a person to that position.

DR. UFFEN: Does your management committee have a quorum, or is it an operational thing where you work with whoever is here? People aren't always available, they've got other duties.

THE WITNESS: The delegation of authority document does not speak in terms of a quorum. It has never been a problem.

DR. UFFEN: Can you recall the minimum number you've ever had when you held a meeting?

THE WITNESS: I would say seven or eight.

MR. LASKIN: Q. Is it provided for by the Statute?

THE WITNESS: A. No, it is not.



Q. This is something that has grown up by virtue or organizational structure and practice within the Board, apart  
5 from the Statute?

A. Since the early forties, the Board has had a group of senior managers act in this capacity. In Mr. Lake's time it was called the principal officers group, for example.

Q. Could I just...I just wanted to complete a little bit of housework on this committee in terms of Professor Barth...and  
10 could you, Mr. MacDonald, just look at page five, sixteen with me, for a moment?

The Chairman has taken you to two previous statements in Professor Barth's chapter five, about the management committee, with which you agreed, and I just would ask for your comment on this,  
15 and I'm looking at the last paragraph on page five, sixteen, and this is after Professor Barth has discussed the development of the lung cancer guidelines, and he said:

"It is surprising to me that Stewart's and Ritchie's recommendations were not adopted by the management committee and the Board."

20 Can I ask you first, factually, whether you recall that to be in fact the case, that the management committee and the Board did not adopt Dr. Stewart's and Dr. Ritchie's recommendations with respect to the lung cancer guideline?

A. Dealing just with lung cancer?

Q. Well, let's start with lung cancer.  
25

A. I believe I gave you an answer to that general situation a little earlier, and I believe there was a sincere difference of medical opinion as to the automatic presumption of lung cancer, which the Board and the management committee accepted when the guidelines were presented.

30 On the other hand, we have the situation that had we accepted some of those recommendations, we would have had





5 A. (cont'd.) more restrictive guidelines than we presently did develop, and the other thing, of course, I emphasized is that the Board insisted that there be the escape clause that allowed any case to be dealt with.

Q. Do you have any other reaction to that sentence of Professor Barth's?

10 A. I suppose you could say this - with the benefit of twenty/twenty hindsight you might do some things differently, and I really have difficulty in getting myself back in my mind as to what was in my mind as of the day these particular guidelines were recommended to it, but essentially what the Board was doing, as I've said on several occasions, we were trying to get the best expert advice we could to assist us, and then...in this  
15 difficult situation.

Q. Does Dr. McCracken sit on that management committee?

A. Yes, he does. He is the executive director of medical services.

20 DR. DUPRE: On that, could I pass to you the organization chart of the WCB, that we have here, so that I can...

THE WITNESS: I think I have a copy of it here.

DR. DUPRE: Oh, good. So I can simply pin down who is on the executive committee.

25 I take it that all eight of the executive directors who are at the bottom of that chart sit on the management committee?

THE WITNESS: That's right.

DR. DUPRE: Together with the senior executive director and assistant general manager?

THE WITNESS: That's right, whose name is not shown.

30 DR. DUPRE: To whom the executive directors for the claims service, communications and vocational rehab report?

THE WITNESS: Right.



DR. DUPRE: Are those executive directors themselves on the management committee?

5 THE WITNESS: Yes.

DR. DUPRE: Now, looking at the lefthand vertical column on that chart, do I take it that the actuary, the equal opportunity co-ordinator, the internal audit director, the solicitor and the head of the worker advisors are on the executive committee as well?

10 THE WITNESS: No, they are not. The ones that are on ex officio - not voting members of the management committee - are the actuary, the solicitor and general counsel, the director of internal audit, the executive co-ordinator of regional operations, the executive co-ordinator of resource and development, and the registrar of appeals, and also the secretary of the board.

15 DR. DUPRE: Okay. There's only one that I can't quite find on that chart. I find the regional operations box, I find the registrar of appeals, but is one other position that you named right...

20 THE WITNESS: Executive co-ordinator of resources development is an appointment which has been made in the last two months.

DR. DUPRE: Oh, I see. This was a nonexisting...

THE WITNESS: This is a new position.

25 DR. DUPRE: I see. And is he under the assistant general manager, or...?

THE WITNESS: No, he reports directly to me.

DR. DUPRE: And he heads the division for you, so...

THE WITNESS: He has a division, yes. A small division.

30 DR. DUPRE: Which inherited part of some other division that existed before?

THE WITNESS: Part of his function was within the





5 THE WITNESS: (cont'd.) administrative resources division before, and he was director in that division before, but he was promoted to the position and given a broader function. It is one of the two recommendations that Professor Weiler made that were administrative...we have proceeded with in advance of legislative change, the other one being provision of full access to claims.

10 DR. DUPRE: There is still, however, an executive director for administrative resources?

THE WITNESS: Yes, there is.

DR. DUPRE: Dr. Mustard?

15 DR. MUSTARD: Can I ask one question while we are still on this? On the righthand side of that chart at the bottom, there is the assistant general manager and three people reporting to him. Do they operate as a group as well? Do they have meetings as a group to discuss what they are doing and where they are going, or do they work entirely within your overall management group?

I would be interested if you could just tell me how that box functions in the system, that part of the chart.

20 THE WITNESS: That is a situation that was created about six months ago. I am sure that Mr. Kerr does have his own meetings with these executive directors in terms of keeping himself abreast of what is going on within their particular operations, but they do not operate unilaterally as a management group. They operate within the management committee in terms of policy changes and any other matters which would change a program, for example.

25 DR. MUSTARD: What does Mr. Kerr do?

30 THE WITNESS: Quite frankly, if you will look at the reporting situation that I was living with - I had about sixteen people reporting to me - it became very, very difficult, if not impossible, to encompass such a chain of command. It was impractical and it was at my request that this change was made.



5 DR. MUSTARD: I guess then, Mr. John McDonald doesn't have direct access to you? He goes through Mr. Kerr, whereas McCracken would go directly...

10 THE WITNESS: In practice we have made it very clear that there is no barrier between myself and any of these individuals, and I'm sure if you will ask those individuals they feel that they have direct access to me and I'm sure Mr. Kerr understands that and accepts that and welcomes that.

15 DR. UFFEN: I was just going to make an observation that after the war, the Second World War, this kind of organizational structure was fairly commonplace, but I believe as time has gone by people would have recognized what you have just offered as an observation - that it becomes a bit unmanageable if you have much over eight or ten people reporting directly to you.

When I looked at this chart, I was surprised that there were not at least two more assistant general managers to help you with the complexity of day-to-day operations.

Have you contemplated more changes of a similar nature?

20 THE WITNESS: I want to be careful what I say here, but if you will look back to the report on the task force of 1971/72, you will find that they took the textbook approach to organization, and that says that you must eliminate layers of management.

25 They took the position, not only at the top of our organization but throughout the organization, that there shall not be, there is a prohibition, assistant anybody.

30 What we have here...when I was executive manager, which I referred to earlier in the..when I was talking about my career at the Board...Mr. Kerr at that time was the assistant executive manager and effectively did what he is now doing for the same departments, which he has the most expertise in.

He came up...as I mentioned, my experience in the



5 THE WITNESS: (cont'd.) organization was on the financial side, his experience was in the claims and rehabilitation side, as well as he at one time being the administrator at our hospital and rehabilitation center, and in fact at one time also being in charge of the medical aid division, in charge of the communications division, so we have taken the expertise that we have in terms of experience in management and set up an organization that takes the best advantage and use of that.

10 Dealing with your question about whether there needs to be further breakdown, I think there could be usefully more further breakdowns, but we are taking this on a careful and experimental basis.

15 I do...I don't intend to be entirely critical of the fact that assistants are necessarily a bad thing. I think they can cause a problem. If in fact the executive director of any one of those divisions did not feel any freedom to come to me, then the organization would not be operating properly.

20 MR. LASKIN: Q. Mr. MacDonald, just to go back to one point you did mention in your evidence before the break, and just to clarify it, we were discussing, I think, Professor Weiler and potential systems for compensation, and one of the alternatives you mentioned was a system that would somehow recognize a principle of partial cause.

25 I just want to make sure I understand what you mean by that, and I appreciate the fact you gave me a copy of an address made by the chairman to the Sixty-fourth Annual Conference of the Industrial Accident Prevention Association last April, April of 1981, where he recommended the same principle, but simply stated it, and I just want to make sure I understand what you mean by that.

30 THE WITNESS: A. What was meant by that was that if you do not have an alternative scheme to which to allocate a





5 A. (cont'd.) case that clearly is not the  
responsibility of industry, then if you want to have some way of  
taking care of the case and paying at least part of the compensation  
that would be payable if it could be accepted totally, then you  
need to have legislation that says that regardless of whether or  
not the exposure period has been long enough in terms of scientific  
advice, or whether the latency period has been long enough in terms  
10 of scientific advice, simply on the evidence that there has been  
exposure to a carcinogenic agent in the work force, or some agent  
in the work force which produced an industrial disease, that that  
can be recognized on some sort of a percentage basis.

15 It is not the thought that you would make the case  
completely allowable or that you would tie together conditions and  
substances and industries to make, you know, the situation in  
schedule three pertain, but just that you would be able to say to  
the individual, who knows that there has been some exposure within  
an industry, that to the extent that that has had some effect, we  
can recognize it.

20 The better alternative, which I referred to earlier,  
is to have a universal scheme that can ascribe those cases that  
clearly aren't industry's responsibility to another kind of benefit  
scheme.

DR. DUPRE: The alternative, you just said, is to  
have a general disease compensation scheme?

25 THE WITNESS: Right.

DR. DUPRE: And...you added something...and to...?

THE WITNESS: Well, that would mean that it would be  
charged to that scheme and not to industry.

Now, you might want to consider a sharing between  
the two schemes on the basis of certain exposure components.

30 DR. DUPRE: Or perhaps, let's pause on this for a  
moment, or perhaps with respect to certain diseases. Could I just



DR. DUPRE: (cont'd.) elaborate on that, because I'm interested in the extent to which asbestos is a case in point.

5           You see, I can see where one posits a general disease scheme, compensation scheme, coexisting with a worker's compensation scheme that deals with injuries primarily, but might deal with some disease, I could see a situation where your general disease compensation scheme might quite logically be the compensation scheme with respect, for example, to the asbestos-related cancers, in the  
10       sense that when you are dealing with these cancer diseases there is the whole question of industrial exposure always...the length of it, and so on, as distinct from lifestyle, as distinct from any of a number of other situations.

15           In some ways, the asbestos-related cancers indeed seem to fit what Professor Weiler describes in the brief closing pages of his green book, in the sense that, as he puts it, all the questions of length or extent of exposure, latency, lifestyle, the works, are all interrelated. So I could see, perhaps, how the asbestos-related cancers...or indeed how the cancers that can  
20       sometimes be related to asbestos might perhaps be well housed in a general disease compensation scheme.

25           But then at this point I ask myself about asbestosis and mesothelioma, at least in the following sense that Professor Weiler does point out, and as a general proposition I guess, hard to argue with, he points out that few diseases are specifically industrial in the sense that exposure to a particular  
30       process or substance is both necessary and sufficient, and he says few diseases are like this.

          But one could certainly, I think, without any hesitation in the case of asbestosis, and quite possibly in the case of mesothelioma as well, if there has been some exposure, say no, these are different, these do fit the designation of a  
35       specifically industrial disease, and perhaps those might continue





DR. DUPRE: (cont'd.) to be dealt with by the agency, the workers' compensation agency that deals with injuries.

What is your reaction to that?

THE WITNESS: I think it's clear that that would be so for mesothelioma. I'm not so sure that it's as evident for asbestosis. I think there are a significant number of asbestosis cases that may be outside of industry.

DR. DUPRE: But in any event, getting away from this point, labelling the name of any particular disease, what do you think of my general proposition, namely that specifically industrial diseases might well continue to be compensated by the workers' compensation industry, by the Workmen's Compensation Board, whereas the other diseases which may well be industrial in part, but are not specifically industrial, would be in the general disease compensation program?

THE WITNESS: I agree with the theory and I think there is a difficulty in finding out the exact line of diseases, but in principle I would agree that if we could isolate to industry those things that are clearly their responsibility, we should do so.

DR. DUPRE: Can I though, if I may, since you mentioned it, simply ask you why in your opinion you would, at the moment, not include asbestosis on the list of a specific industrial disease?

THE WITNESS: Are you talking about placing it in schedule three...

DR. DUPRE: No, no. I'm positing a situation where we had some major policy changes and legislative changes in this province and there existed a general disease compensation scheme. There then, of course, continues to exist a workers' compensation board. The Workmen's Compensation Board, of course, would look after, of course, industry. It would also, simply to fill out my scenario, look after compensating for those diseases



DR. DUPRE: (cont'd.) that are indeed specifically industrial.

5 I'm asking why, in your answer to me, you said you would have no trouble including mesothelioma as industry-specific, but might have some questions about whether asbestosis was industry-specific.

THE WITNESS: My answer, having to do with mesothelioma, I assumed exposure to asbestos.

10 DR. DUPRE: Yes.

THE WITNESS: If you want to say some adequate exposure to asbestos fibers as far as asbestosis is concerned, I could say they would be the same.

15 We are really saying in mesothelioma cases that any exposure, the slightest exposure, and it's automatic presumption. There is still some demurring in the scientific community about the amount of exposure as far as asbestosis generally is concerned, and that's what I'm having some difficulty with.

20 DR. UFFEN: Could I just clarify something, though, that I think you said earlier on, words to this effect - a significant number of asbestosis cases occur outside of industry. I'm not sure that those are the...

THE WITNESS: I think those are the words I used.

DR. UFFEN: Could you elaborate on that? What kind of cases outside of industry?

25 THE WITNESS: Well, I'm talking about the world around. I think there are a lot of cases that have been shown to have occurred where people have simply used products, just been consumers of products and have not been involved in the manufacturing process.

30 If you look at the litigation that's going on in the United States, I think you will see a lot of that.

DR. UFFEN: I know this is outside of the Workmen's Compensation Board, but we had a course in epidemiology



DR. UFFEN: (cont'd.) last year, and your statement comes as a bit of a surprise.

5 DR. DUPRE: I guess, just to share with you our own findings of the course, if we act or otherwise, but yes, to the extent that sometimes consumer products have been involved, this is precisely where diseases like some of the cancers come in, but frankly we, and I'm sharing this with you because if you have  
10 got some specific information that gave you that impression, we would love to have it because at the moment all of the information we have would be really to the effect that if you are talking asbestosis, industrial exposure and only industrial exposure has ever been associated with the diagnosis of asbestosis.

15 THE WITNESS: I am not an expert, sir, and I bow to the comments that you are making. I can accept them.

20 DR. DUPRE: Okay. And I'm not saying it in any way to put you down. If by chance you had run into something that challenged what I have just said, we would love to know, because that's...not many things, you know, are crystal clear in the medical side, but I think that that is one of them that even Dr. Mustard, the most suspicious of all, would say is probably a straightforward relationship.

THE WITNESS: Should there be anybody in my organization that disagrees with your proposition, I'm sure they will tell me.

25 MR. LASKIN: Q. Can I just ask you, when you gave the answer before to one of my questions that you felt the preferable way to go was a general disease compensation scheme, in your judgement, did you have in mind the kind of scheme that the chairman put to you - that is, a general compensation scheme coexisting side by side with the existing compensation under the  
30 WCB for those specific industrial diseases, or did you have in mind taking the whole industrial disease matter out of your structure





Q. (cont'd.) and organization and putting it in a general disease compensation system, regardless of whether some...

5 THE WITNESS: A. I don't have a particular brief for what kind of organization you should have. It might be most efficient to have both schemes administered by one authority, if you want to look at administration and cost effectiveness.

10 What is necessary is the compartmentalization that can take place in terms of where the costs of the scheme are charged. Let's keep in mind that ultimately the consumer of goods and services in any jurisdiction will pay for the various social schemes that are developed, and there is a great inequality between what happens in the public sector and the benefits available to people generally and I'm sure some people will resent it being called this, but the special privileges and benefits which are  
15 paid to industrial workers. There is a great discrepancy.

I have asked myself whether South Africa went the right way in establishing a supplemental scheme for accident. They might better have gone, in my judgement, for a supplemental scheme for disease. That's where the real need is.

20 Q. Can I ask you just one further question which arose out of the discussion we had before the break, and it concerns your comments about the public perception of the way in which the WCB now operates, and we talked about guidelines and we talked about the appeal process and so on.

25 Does that concern about the public perception lead you to have any views about the relationship between the advisory committee on occupational chest disease and the Board?

A. No. Exactly the same comments pertain, obviously.

30 Q. Which...and again I invite your personal judgement and you have been candid enough to give it to us before... what would you contemplate in terms of the advisory committee on



Q. (cont'd.) occupational chest disease?

5 A. I consider them to be in the same category as any group that might be set up to do research, or the group to establish guidelines. I would consider that they should be housed separately, paid separately, supervised separately, be seen to be truly independent of the Board in every way.

10 Q. But would you still have them perform the same kind of function that they have been performing for the Board? That is, would you still have them making recommendations to your medical services division on individual claims for asbestosis?

DR. DUPRE: Percentage impairment in particular.

Q. Percentage impairment?

15 A. Well, I think you have to couple that with the concept that we need to have a separate group to which you would refer differences of medical opinion.

20 What I would see happening, if you want to become specific as to what you need as it relates to the chest advisory group, I think that inevitably somewhere within the Board, and it wouldn't necessarily need to be separate at that point, you need an expert group to evaluate and adjudicate on the medical evidence that comes to the Board.

25 The fact that the chest advisory committee is housed in the department of labour doesn't really change the fact that it is really giving internal advice as medical experts to our adjudication process. That would have to continue, and it could be done either as an advisory committee because of the section that permits the Board to either appoint a staff to do it or appoint committees to do that kind of thing, it can be done either way, but then following that you would then need, in the case where you have a dispute as to the caliber of medical evidence, you would need the truly independent group of medical advisors which  
30 is envisaged in the legislation proposed by Weiler, to deal with





A. (cont'd.) the matter.

5 So I think, answering your question, part of the function of the chest advisory would become internal, and part of it would be external.

They really are trying to act as that independent group in advance of the adjudication now, and the perception just doesn't show it that way. But that's what they are trying to do.

Q. We appreciate that.

10 DR. MUSTARD: Can I pursue a slightly tangential aspect to this?

MR. LASKIN: You certainly may.

15 DR. MUSTARD: And go to section forty-three of the Act, forty-three, one, and the ombudsman's report, Mr. Robinette's statement and Mr. Leo's statement, and I would like some help here from you.

20 The ombudsman, as I interpret his document, is encouraging the Board to give more...to give consideration to factors in addition to the degree of injury, in determining compensation, as I understand it, and the two legal opinions suggested that you were dead right in interpreting it primarily within the degree of injury...as I read them.

25 THE WITNESS: Well, that really is an oversimplification of the situation. There was a lot of discussion about those two areas. In essence, what was being sought was to have the Board ignore earnings after accident in the assessment of what estimate of disability there was there. It wasn't the business about disablement and impairment were clouding the issue. The whole problem that the Board was faced with was, regardless of whether you called it disablement or impairment or whatever, we felt that you cannot ignore the fact that the person is back at work and earning a specific amount of money, in determining what his wage loss or what his impairment is.

30



THE WITNESS: (cont'd.) It's the issue of ignoring earnings after accident that really is behind all of this discussion.

5 DR. MUSTARD: All right. Well, that's an important point, because what I'm trying to get at is the question of clinical estimates of impairment in which you've got two components, and if I take asbestosis as an example, and take the story of high blood pressure as analogy to get at the point, when you tell  
10 someone they have a disease such as asbestosis, you not only have to cope with, clinically, the pulmonary function changes that may go with that, which physically impair the capacity to work, there is also the behavioural/mental response we all have to being labelled with a disease, which also substantially changes attitudes.

15 Now, in the field of high blood pressure there is substantial documentation that you can detect high blood pressure long before people have any clinical symptoms, but when you tell people they have high blood pressure, you do substantially change the behaviour. The absenteeism from work goes up, the attitude to work changes. Clinically, that's the...to many of us in the  
20 profession, that's a clinical problem, that you have affected the person and their attitude towards things.

Therefore, in this debate about section forty-three, one, and the interpretation of the assessment of clinical impairment, is there or is there not this other dimension brought into it?

25 In other words, the specific measurement of a person's pulmonary function capacity may say yes, that person has got ninety percent of their pulmonary capacity, you should be able to do something, but they have been given the label of a disease which has affected them clinically in terms of their mental outlook on life and what they should do.

30 Is there any debate going on about that dilemma, or



DR. MUSTARD: (cont'd.) do you take that other dimension into consideration in the compensation award?

5 Am I making myself clear?

THE WITNESS: Yes. Well, that dimension has to be taken into account when you are determining the amount of permanent disability that you are going to pay, and certainly all of the circumstances relating to the man's disability have to be taken into account in that permanent disability award.

10 DR. MUSTARD: Have you got any documentation in the Board that helps you in this matter, and it's a difficult one? I must say, I'm only aware of the real assessment of the impact of a label being given to somebody about a disease where there isn't still much clinical impairment, and the high blood pressure field is a classic example.

15 Do you have data about what happens to peoples' behaviour when you tell them they have got asbestosis, and do you have guidelines as to how that can then be used in the claims information?

20 If you have, I would love to know about it and love to see it.

THE WITNESS: Did you ask questions of John McDonald with reference to this point?

DR. MUSTARD: No, I did not.

25 THE WITNESS: I don't know that there are statistics of what you are asking about, or particular studies that deal with this matter. Perhaps Dr. Dyer can help me.

I guess I have to come back...these are different kinds of questions, Dr. Mustard, than really were being dealt with by the ombudsman or by Robinette, or any of the people who gave legal opinions.

30 Really what was flowing from this was the request that we ignore earnings completely in trying to make a determination





THE WITNESS: (cont'd.) of the additional award that should be made, and we get into the 'what if' kind of analysis.

5 All through the Act, the basis for compensation has a limit on it traditionally, and it has been written in a way that you cannot end up, in pension or in temporary compensation, paying more than seventy-five percent of the man's gross earnings.

DR. MUSTARD: Yes, I appreciate that.

10 THE WITNESS: That is the key issue and all that the two opinions we got said is that in fact you can't.

15 DR. MUSTARD: But my reason for bringing this up was that during the testimony I've gained the impression that the impairment assessment is being done on a fairly restricted clinical assessment of function, and that this other dimension which comes into, would be tied into how you interpret the Act, is also another problem.

20 I realize it's not the same as the financial one, and I was just looking at the wording of forty-three, one. You can interpret it very specifically as a restricted clinical impairment just on a straight physical, without the psychological, mental components to it, and I just wondered, therefore, what documentation you had in your own organization to handle this enormously difficult question.

25 THE WITNESS: Statistics could be given to you concerning the number of supplements which were made under forty-three, and I think you would be surprised at the high number of supplements that were made. Have these been documented with you?

30 DR. DUPRE: Not terribly well. In connection with that, I could...it might be helpful for both of us, Mr. MacDonald, if I simply pointed out the following to you: That Professor Barth, in his study, beginning around pages three, sixteen



DR. DUPRE: (cont'd.) and on to three, seventeen, points out that in his view, from what he was able to see..

5 THE WITNESS: In the asbestos cases?

DR. DUPRE: Yes.

Subsection five of section forty-three was hardly ever used to supplement the clinical impairment rating of forty-three, one, which of course would simply indicate that from what Barth saw, you were indeed operating in accordance with forty-three, one, the way it has been interpreted.

10 But I noted last night when I had the opportunity to read through Dr. McCracken's critique of Barth, which we have just gotten, the following point which appears in paragraph four point eleven, about the fifth or sixth page of Dr. McCracken's critique.

15 You see, there Dr. McCracken says, having said Barth suggests that supplements to pension is used very rarely in cases of asbestosis-related (sic) disease, Dr. McCracken goes on to say:

20 "We are able to find cases where indeed the supplement has been used, where in the opinion of the claims pension adjudication staff there was a disparity between the pension and the person's ability to earn income.

25 Indeed, we are able to cite a case where in all probability the supplement was used excessively and was not predicated upon the compensable impairment, but rather was related to noncompensable conditions."

30 Then, of course, he says: "We feel that it is important to point out that the percentage of clinical impairment could not be adjusted upwards in order to address the socioeconomic problem."

So I guess there is, there seems to be a disparity,





5 DR. DUPRE: (cont'd.) at this point, before us, between what Professor Barth pointed out and what Dr. McCracken in his critique of Barth alleges. If there is something that can be done to clarify the situation for us, I guess...

THE WITNESS: I will get you whatever information has not yet been provided, but I would like to make a general comment.

10 The asbestosis situation was different from the general disability situation in the sense that the age group of the people concerned, the job opportunities, the return to the work force, was a different kind of mix than you get generally with permanent disability pensioners, and therefore, the opportunity to use forty-three, five was less.

15 Barth is incorrect to say that it was never used. McCracken has pointed out that it has been used. But I would not want to leave the Commission with the impression that it was used routinely in asbestosis cases, because the circumstances most often didn't justify it.

20 But apart from all of that, when the smoke clears away, when you are going to be dealing with those two opinions, regardless of what we could pay in terms of the analysis we made of the person's ability to work, the issue that underlies it all is the inability to pay beyond seventy-five percent of the person's preaccident wage, within the ceiling.

25 DR. MUSTARD: Can I just make..what I would appreciate out of this debate is, if you do have some kind of information about how you assess the change in attitude of a worker now labelled with a disease, if you have that information and how it impairs his or her attitude and capacity to work, I would appreciate our having it, and how it is applied in determining  
30 compensation.

What I'm really trying to get at is, that the way



5 DR. MUSTARD: (cont'd.) ...I fully understand that's  
the way the Act...we've heard it...I could rest my impairment on  
a measure of the change in pulmonary function, say in asbestosis,  
and say the degree of impairment is ten percent, etc., and  
therefore that should be about what the rating should be, but  
there is a psychological impact of labelling with the disease,  
which substantially changes peoples' attitude, which might create  
10 an eighty percent impairment in terms of the person's capability  
of working, perhaps the capability of working, and if you do have  
some information on that we would appreciate having a chance to  
look at it, how you apply it.

15 THE WITNESS: The difficulty is, and it will continue  
to be even under the changes recommended by Professor Weiler, that  
the person who chooses to remove himself from the work force with  
a clinical...with an ability to earn...has to be deemed, even under  
the new legislation by the Board...if someone is not a hundred  
percent disabled, we are still going to have to deem him capable  
of earning and have regard for that in making whatever award we  
make beyond the lump sum. The problem is not going to go away  
20 with Weiler.

DR. UFFEN: Can I come back to the two legal  
opinions? Did they make any distinction between injury and  
disease?

THE WITNESS: No.

25 DR. UFFEN: Because as I read the thing, it  
says clearly: "Where permanent disability results from injury",  
and it's being applied to disease.

THE WITNESS: Injury and disease are held to  
be synonymous within the legislation.

DR. UFFEN: Oh, within the legislation.

30 THE WITNESS: Mmm-hmm.

DR. UFFEN: Now, this raises a very interesting point



DR. UFFEN: (cont'd.) to me as a layman, is the  
legislation adequate or correct to make injury and illness  
5 synonymous?

For example, I see that if a person loses a limb  
in an accident, they are not going to die from it or it may not  
get progressive, they are not going to lop off another couple of  
inches every year. But industrial illness is often progressive  
and it's a fundamental question. Maybe the legislation is  
10 inadequate, so it may be an unfair question to put to you, but  
from your experience do you think that the legislation should have  
another look?

THE WITNESS: In practice I don't see there has  
ever been a bar to the allowance of an industrial disease, and  
my understanding...and I'll defer to our general counsel who may  
15 want to comment...the Statute stipulates that injury and disease  
are in fact interchangeable and synonymous.

DR. UFFEN: It says that they are interchangeable  
in here, does it?

MR. LASKIN: Section one twenty-two, sub one.

MR. RIDDELL: Section one twenty-two, subsection one.

DR. UFFEN: Well, that's a little bit beyond  
20 your...

THE WITNESS: Well, I don't...

MR. RIDDELL: "As if the disease was a personal  
injury by accident", that is the...

DR. UFFEN: Well, I'll just finish my comment.

With the particular industrial illness we are  
dealing with, which has some extraordinary aspects of it such  
as latency, it suggests to me that there is a difference. I may  
be using layman's words for what a medical person would put more  
25 correctly, but I would think that it might make a substantial  
30 difference to a man's disabilities relative to his impairment





5 DR. UFFEN: (cont'd.) whether he has a progressive illness with periods of questionable latency, things like that, with in the case of lung cancer and mesothelioma, death, not disability, as the end of the line.

I shouldn't make speeches, but would you care to comment on this observation?

10 THE WITNESS: I don't, frankly, see, sir, where the latency or the time factor in the progression to the final disability changes the fact that it is the same as an accident under the Statute.

15 DR. UFFEN: I agree with you that it's the same under the Statute, but I don't think it's the same. If you were engaged in an occupation where the serious effects may occur to you, unbeknownst to you, twenty, thirty years later, the question of compensation seems to me to be different from when an accident has occurred and the results of the accident are there to be seen immediately.

20 THE WITNESS: I suppose the ease of administration and adjudication is certainly there as far as an accident is concerned. It's more difficult in the industrial disease case, definitely.

25 MR. LASKIN: Mr. Chairman, I was going to turn to an entirely different subject which related to the document that Mr. MacDonald was kind enough to have prepared for us, but I know Linda Jolley may have a few questions and she has a personal commitment that prevents her from being here this afternoon.

It might be appropriate to interrupt.

DR. DUPRE: Miss Jolley, may I invite you, please?

MISS JOLLEY: I certainly appreciate this. I'm sorry I won't be able to be here this afternoon.

30 CROSS-EXAMINATION BY MISS JOLLEY

Q. I just have actually two questions, Mr. MacDonald,



5 Q. (cont'd.) because I'm sure John is going to cover some of the aspects I also want to get into, but it's my understanding - and we dealt with this earlier in testimony about the Board - was that the benefit of the doubt applies to all adjudication decisions throughout the Board. Is that correct?

A. That is correct.

10 Q. We have had evidence, however, that Dr. Cam Gray gave, that in fact the advisory council on the chest do not operate with the benefit of the doubt...on a benefit-of-the-doubt premise, that in fact they go with a majority opinion, and if in fact there are other physicians on the committee that disagree with the majority, that is not even transmitted to the Board.

15 It worries me a little bit that if in fact all levels of adjudication are to have benefit of the doubt, why in fact that is not happening at that level as well.

A. I was unaware of that. This is new information to me. There is certainly no direction from the Board that they should act in any way differently from any other group.

20 They are appointed as a committee by the Board, and I am surprised to have you tell me that that's what his evidence was.

Q. It again speaks to the medical uncertainty, and I would think if there are discrepancies in medical opinion at that level that they should be transmitted to the Board.

A. I would agree.

25 Q. The second area, and I think John is going to get into it because of this experience rating, and that is - I wondered if you could tell us what the philosophy of the WCB is in terms of prevention. The Barth report deals a lot with the function or the role as a social insurance program, but when the Board was first set up it also had a role in terms of preventing  
30 illness and injury, and I wondered what the philosophy is behind that.





5 A. There has always been a section of the Act which envisaged safety and accident prevention being carried out by the Board, and the legislation placed the impetus on employers to form themselves into associations and come to the Board when they sufficiently represented an industry, to request funding and support.

In practice, the Board has encouraged groups where there has not been representation, to take such action.

10 But if you look at the legislation even today, the requirement is that the employers themselves take the first step.

Now as far as experience rating is concerned, it also is permissive under the legislation, and we took steps in the early 1950's to be certain that an efficient experience rating plan was developed which didn't prejudice our overall reserving position, as many experience rating plans have elsewhere, and a plan was developed at that time in which the plusses equal the minusses under the refunds and charges that were made, and again it is made available to industry after a poll is taken of the firms who would be affected.

20 Q. I guess the question I'm asking is the whole issue of trying to internalize costs to industry, and it's worrisome in the disease aspect because I don't feel that a lot of the costs are being internalized through the workers' compensation system into industry, and as a base for experience rating I'm not sure that the base that we have would in fact promote prevention of disease, in the system.

25 A. I have to speak very frankly about industrial disease, in terms of its cost and how it affects prevention.

I think the evidence very clearly is that the costs of industrial disease have come along so long after the conditions which prevailed in the industry that produced the disease, that there is no way in which industrial disease costs or experience



5 A. (cont'd.) rating charges which arose out of those costs have in fact affected experience rating, and it's simply because of the long time between the condition, recognition of the hazard and the eventual claims which triggered costs and action.

10 I agree. If your point is that industrial disease experience has not effectively, in the past, produced accident prevention work, that is certainly a fair observation.

I think now...

Q. But are you suggesting to us it can?

15 A. ...with the tremendous volume of new chemicals and whatever, that are coming on the market, I'm sure that a lot more consideration is being given by both the accident prevention associations and individual employers as to the future impact of that.

20 Q. Are you suggesting that...I'm sorry, I'm having trouble hearing...are you suggesting that in terms of disease that a compensation system cannot in fact effect prevention in the future?

25 A. No. I am saying that because of the phenomena that are now seen, that in fact these things come along so much later, I think you will find that in the programs of the actual existing safety associations, they are now developing programs that deal specifically with the hazards, the new hazards of chemicals in the industry.

30 Q. But that's in terms of education. I guess I'm speaking of direct costs back into the industry, as an incentive to prevention. I mean, that was one of the purposes of compensation as well, and do you not see it possible to use the compensation system to effect prevention through internalization of costs?

A. The costs that arise from current industrial disease clearly do affect experience rating charges which are made



5 A. (cont'd.) currently, and could affect the penalty charges which can come under the penalty section of the Act, and in this case the employer concerned had large experience rating charges flowing from the cost of these claims.

Q. How do you deal with a corporation that moves out of this jurisdiction, closes down and moves out of this jurisdiction, and in fact the disease starts to come through after he has left?

10 A. Unfortunately, we have no section which permits us to follow such an employer to his new location. He would have to be in business in the province to be affected by the cost of it.

Q. I'm sure John will go on into the experience ratings, I'll leave that.

15 But the last question I have is a question of public perception, and I would just like to put it to you for your comment. You suggested Dr. Mastromatteo has been placed on the head of a subcommittee that looked at guidelines for industrial disease because of his expertise, but nevertheless he does represent International Nickel and I think that that, in terms of  
20 public perception, especially from labour, presents a fairly difficult conflict.

A. As I recall it, his two committee members were Mr. Waddell and John Stephanini. I'm sure they looked after their interests.

25 MISS JOLLEY: Thank you very much.

DR. DUPRE: Well, this is probably now appropriate for the lunch break, and we shall rise, counsel, until two-fifteen.

THE INQUIRY RECESSED

30 THE INQUIRY RESUMED

DR. DUPRE: May we resume?





EXAMINATION-IN-CHIEF BY MR. LASKIN, RESUMED

5 Q. Mr. MacDonald, just before we come to this document, could I just pursue with you very briefly a matter which Linda Jolley raised just before lunch, and indeed which I had wanted to question you about, and that is, she asked you about the advisory committee and its application with respect to the burden of proof, and you expressed some surprise at the testimony of Dr. Gray - at least as it was reported to you this morning.

10 Can I ask you this: Are you aware as to whether there are any directives, terms of reference or like material emanating from the corporate board to the advisory committee as to the advisory committee's responsibilities and the manner in which it should be carrying out its tasks?

15 A. I'm not aware of any directives from the corporate board per se, to the chest advisory committee.

Q. In what manner does the corporate board, if at all, supervise the ongoing activities of the advisory committee?

20 A. The corporate board does not exercise any jurisdiction over that committee.

Q. Does it get any reports regularly as to the manner in which it's carrying out its operations?

A. No.

25 Q. No? Is it fair to say that the advisory committee is basically pretty insulated, at least from the corporate board?

30 A. There is no routine established whereby it automatically reports to the board. I would feel that it would feel quite able to approach the corporate board if it considered it had a problem. Certainly it is not being supervised per se by the corporate board. It is considered to be an independent group of advisors.



Q. And treated as such?

A. And treated as such, very circumspectly.

5 Q. Can we then turn to this document which is headed Interdivisional Communication, and is apparently from Mr. J.C. Neal, N E A L, I take it is your Board's actuary, dated July 9, 1982, and I'll mark it as an exhibit as soon as I can find out what number we are at, Mr. Chairman.

10 Can you tell us what this document is, Mr. MacDonald?  
What do we have here?

A. I understood from conversations that we had earlier that you are interested in experience rating generally, that developed under the plan, and specifically what had happened to the Johns-Manville company under experience rating.

15 Anticipating that you would ask me questions about that, I asked Mr. Neal and his staff to develop a document for me. That is the document. I would like to simply make a summary of what it contains, and if you have a specific detailed question about isolated points within the document, Mr. Neal is here to answer questions.

20 Q. Okay. Why don't you give us your summary of the document, and then perhaps we can deal with it in more specific terms.

25 A. We analyzed the ten year period from 1971 to 1981, and during that period the accident cost of Johns-Manville companies...and this is direct accident costs, not any additional costs for administration or things of that nature...but accident costs were seven point zero eight million, which was approximately three times their regular assessments of two point three seven million.

30 In addition, the majority of the experience of Johns-Manville companies is subject to the Board's voluntary experience rating program which resulted in surcharges of a further





5 A. (cont'd.) thirty-six percent, or a dollar amount of eight hundred and fifty-five thousand dollars, of their regular assessment.

The demerit assessments under section ninety-one, seven were not issued for these companies because they did not meet the criteria of components in the demerit formula.

10 The net result was that other companies in those industries, by reason of collective liability, supported Johns-Manville in the amount of six point two eight million dollars, and as you have indicated, an exhibit has been filed giving details of that information.

15 Q. You have also distributed to us a little red booklet - Experience Rating Plan for Employers Operating Under Schedule One. I take it this is the plan in effect at the present time and pursuant to which Johns-Manville operated?

A. The booklet describes the actual mechanics of the calculations made under the plan, and also describes the way in which any industry may apply for a poll to be taken so that the plan is put into effect in their classification.

20 In this situation, the polls were taken in the late 1950's, covering the industries that Johns-Manville were affected by, and the plan has been in effect since approximately 1957 or 1958, in those industries.

25 Q. When that poll was taken, what determines whether an industry classification will be subjected to the experience rating plan? Is it by majority vote of companies within a group?

30 A. Eligibility is first determined. The booklet will tell you that in order to be eligible to participate in the poll, the employer must have an annual assessment of at least five hundred dollars, an annual payroll of at least fifty thousand dollars. All of the eligible firms within a classification are



A. (cont'd.) then polled, and regardless of the size of their payroll or assessment, one vote per company pertains.

5 In order for experience rating to be applied, two-thirds, at least, of the eligible employers must have...I'm sorry...yeah, two-thirds must have participated in the poll and at least fifty-one percent must have voted in favor for the plan to be put into effect.

Q. Do you know as a matter...

10 A. I'm sorry. I've reversed those percentages. It's fifty-one percent must have voted, and sixty-six and two-thirds must have voted in favor.

Q. As a matter of records, do you know whether Johns-Manville voted in favor of this voluntary experience rating plan in the groups in which it found itself?

15 A. It voted in favor in two out of three, and against in one.

Q. Which one did it vote against in?

A. In fiber glass manufacturing industry, which is, I suppose, curious in the context of this particular commission.

20 DR. DUPRE: What is the number of that group which voted, again?

25 THE WITNESS: Well, they in fact were polled in three categories - one which is not pertinent here today, and in the mining of ore they were polled in 1971, as a member of the group who were mining asbestos products, and on that occasion they voted in favor.

DR. DUPRE: That's in rating group ...

THE WITNESS: That's in rating group...

DR. DUPRE: I'm looking at...

THE WITNESS: Zero ninety-one.

30 DR. DUPRE: Which one?

THE WITNESS: Zero ninety-one. It's a mining classification.



DR. DUPRE: Oh, that's not one of the rating groups that appears in table one?

5 THE WITNESS: No. Rate number one fifty-three is glass products, glass cutting and pottery. They voted against in 1973.

In the main classification, which is where the cases that you are looking at occurred, that is the manufacture of asbestos goods...

10 DR. DUPRE One three seven.

THE WITNESS: ...the rate number five seventy-three, which is now five fifty-five...

MR. LASKIN: Q. Five seventy-three?

THE WITNESS: A. They were polled in 1958, and they voted in favor.

15 Q. Could we just...I think the difficulty we are having is straightening out the numbers, because in terms of the documents Mr. Neal prepared and you so kindly brought to us, if you look at appendix A, there appear to be certain rate group industry classification numbers which...at least as I heard your  
20 evidence...didn't appear to correlate to the numbers you gave.

Have I made myself clear, Mr. MacDonald?

A. I have the results of the poll taken in rate number one thirty-seven. It was polled in 1957, and the statement which was given to me by Mr. Reilly, who is the head of our assessment department, says..and you are going to have to help  
25 me with this, Mr. Neal...it says:

"There is no record of Johns-Manville currently reporting under this rate number."

DR. DUPRE: Well, that would be correct, because according to the Neal document...and I think I'm holding the same  
30 document as you are...J-M left rating group one three seven in May of 1980.





THE WITNESS: Right.

5 DR. DUPRE: Which would coincide, of course, with the time when they closed the asbestos-cement pipe operation.

THE WITNESS: Correct.

DR. DUPRE: So I'm taking it, therefore, that the A-C pipe operation when it was active was assigned to the rating group one three seven.

10 THE WITNESS: Well, clearly there is experience there up and prior to the year 1980. Yes.

DR. DUPRE: Right.

THE WITNESS: I do not have here, but I will get it for you, what their ballot was for one thirty-seven.

MR. LASKIN: It's not in what you have.

15 DR. DUPRE: All right.

MR. LASKIN: Q. Do I take it from looking at appendix A to this document that Johns-Manville was in, during the 1970's, in five separate rate groups?

THE WITNESS: A. It would appear that that's correct. Yes.

20 Q. Just help me with this before we get to the particulars of this document. Is this program, this experience rating plan, is it prescribed for under statute?

A. It's a permissive..it's one zero five, three.

Q. One zero five, three?

A. It says:

25 "The system of merit rating may"...may..."if deemed..."

Q. Be adopted?

A. Be adopted.

Q. So that's the statutory foundation for the experience rating plan?

30 A. Unlike the penalty section which is 'may' in terms of the statute, but a 'shall' situation in terms of charging



A. (cont'd.) a penalty, as far as the regulation is concerned.

5 Q. Could you just run that one by me again? You are talking about section ninety-one, subsection seven?

A. There is a regulation which has been proclaimed under that...at that section, which says 'shall' rather than 'may' increase. It stipulates that it shall be in the first instance a hundred percent, then goes beyond that in subsequent years to higher percentages.

10 We will be quite happy to file with you a copy of that regulation.

Q. I think we've got the regulation, which is at the back of the Statute.

15 A. At the back of the book.

Q. It appears to be section six of regulation nine fifty-one.

A. Right.

20 Q. So do I read those two provisions, statutory provisions, section ninety-one, subsection seven and the regulatory provision, section six, correctly as indicating that the Board, in those instances where the criteria in section six are satisfied will mandatorily impose the demerit assessment, penalty assessment?

25 A. That was a specific policy decision of the Board, to make it mandatory. But all of the conditions that are described in the regulations must pertain.

Q. All three conditions?

A. All three conditions.

30 Q. Then it's mandatory to make the penalty assessment?

A. Yes, it is.

Q. If all of those three conditions do not pertain,





Q. (cont'd.) then there is no penalty assessment?

A. That's correct.

5 Q. And is there any discretion in the Board to make a penalty assessment in the situation where one or two of the conditions are met, but not all three?

A. No.

Q. All right.

10 Now, I take it what we have at the fifth page of this document is the specific history of section ninety-one, subsection seven as it pertains to Johns-Manville, and the reasons why no penalty assessment was made under section ninety-one, subsection seven in those years?

15 A. I would prefer that Mr. Neal give you the answers in this case. He is more familiar than I with that table.

Q. I meant just the fifth page where it sets out the...it's entitled Canadian Johns-Manville, ninety-one seven History.

A. Okay.

20 Q. Now, if we look at rate group one three seven, which is the first one listed there, the second sentence:

"This firm met the three basic conditions for a ninety-one, seven, for the three years 1978 to 1980, but it was not levied since Johns-Manville discontinued operations under firm and rate combination in May, 1980."

25 Which I take it would be the time that the transite pipe section closed down, and I take it Johns-Manville was out of this particular rating group?

A. No payroll and therefore no basis for issuing an assessment.

30 Q. Okay. And, of course, we know that Johns-Manville have continued to have a presence in Ontario in its other



5 Q. (cont'd.) operations, and indeed those other operations are subject to different rating groups within your Board, and presumably if the three conditions were satisfied in those rating groups, a penalty assessment would be made?

A. They would be mandatory, yes.

10 Q. But I suppose what strikes me as a little anomalous is that you, except in your rating classifications which give rise to this scheme, you nonetheless have a situation...not the situation that Linda Jolley posited where the company left the jurisdiction entirely...but a situation where indeed the company is still in the jurisdiction - albeit not operating in a particular classification, and I suppose my question to you is, is there any legislative or regulatory basis for providing for assessments against the company in respect of, say, future disease, 15 if the company continues to maintain a presence here in Ontario, albeit not in this Board-established classification?

20 A. We have no authority to follow a firm into a different classification, and I don't believe we have any authority to follow a firm in the same classification if they change their legal entity of the organization to the point where they can be said to be a different company in any way. We have precedent for that in certain of the construction industries in experience rating and in penalty charges, where by that legal technicality, companies have escaped both experience rating and penalty charges.

25 Q. Can you give me an example of how...by no more, for example, than by simply incorporating a new company?

A. And let's say...

Q. And putting the assets in it?

30 A. Let's say you have been building a construction project for seven or eight years in one location, you finish that particular building and you form a new company to build another building in a different location.



Q. As construction companies are wont to do?

A. Yes.

Q. Single-project companies.

A. Right.

Q. So that again in that situation there would...  
there is no power as you read it, in the legislation...

A. This is a defect in the legislation that we  
would like to see corrected.

DR. DUPRE: Now, could I, if I might, simply ask  
you the following - page one of appendix A gives us, of course,  
all the data that pertains to the J-M operation, that is then  
indeed closed as of a certain day - May 31, 1980.

Now, as you quite rightly point out, Mr. MacDonald,  
given the statutory scheme that is in effect, in a rating group,  
and for that matter, indeed, this would apply, as I understand it,  
whether the rating group is experience rated or not, receipts  
into that rating group are, of course, always based as a percentage  
of payroll.

At this point, when an operation closes, because  
the payroll, by definition, drops to zero, of course the rating  
will drop to zero.

Now, at this point if what you are looking at, of  
course, is a disease situation, well of course in such situations,  
given latency, naturally accident costs will be incurred downstream,  
and indeed can be and will be incurred as the disease becomes  
manifest, for any of a number of years after a firm - because  
its payroll has dropped to zero - has made zero contributions to  
that rating group, and I guess we are beginning to...we are  
seeing the initial stages of that effect right there on Appendix  
A, first in 1980 when the firm only operated for five months, and  
then of course in 1981, when it didn't operate at all.

Now, can I ask you this: Let's take the year in





5 DR. DUPRE: (cont'd.) which...this is the first year in which it didn't operate at all, because that's the simplest one...you've got a cost item there of eight hundred and thirty-one thousand, four hundred sixty-two dollars.

Now, is that cost item, to which the firm in having closed that particular operation contributes nothing, is that a cost item to which the firms that remain there in the rating group make contributions?

10 THE WITNESS: Yes. All accident costs will continue in this case in rate number one thirty-seven, and it will...the cost from all operations, including those firms out of business..will determine the future assessment rates in that industry.

15 DR. DUPRE: Okay.

20 So that what we are looking at here, among many other little problems, is a problem, if you will, of equity among employers in a rating group. Is that correct? Because if one of those employers closes an operation, but given latency it produces downstream costs, it is actually the firms that remain within that rating group that will bear the cost as members of that rating group?

THE WITNESS: That is correct.

25 There is a general section that stipulates that the Board shall rate in the year in which liabilities are incurred in such a way as to engender income so as not to unfairly or unduly burden future generations of employers.

But to the extent that we are talking about industrial disease which is unknown in its future implications, it has not been possible for the Board to properly rate for that kind of situation.

30 Now, while it is true that the individual rate number will eventually bear the result of those costs in its future



THE WITNESS: (cont'd.) rates, there is also the possible application of the disaster rate stabilization reserve to that situation, and I believe in this instance...and Mr. Neal could give you more details of it...that reserve, which is contributed to by all employers, has assisted in keeping that rate lower than it might otherwise have been.

DR. DUPRE: Now, could I ask you the following: As I understand what is depicted here in Appendix A, the firms that remain within a rating group continue to make revenue contributions in relation to costs that were incurred by a firm that is no longer there, although as you have pointed out, some of those costs might be borne by...

THE WITNESS: All industry.

DR. DUPRE: ...by all industry.

Is there anything in the Statute at present that would prevent the Board from doing the following: namely, from assigning all of the costs of that firm, once it has closed the operation...and here we will take the figure eight thirty-one, four sixty-two...from assigning eight thirty-one, four sixty-two in 1981 to all industry, a hundred percent of the eight thirty-one, four sixty-two, to all industry as opposed merely to the industry, the firms that remain in the rating group?

THE WITNESS: Certainly there is no authority for the Board to try to collect it from the employer who is going out of business. I believe it would be theoretically possible for the Board to make a policy decision in that kind of situation, to charge it to all industry rather than to just the rate number in which the firm is.

DR. DUPRE: The firms are...

THE WITNESS: Yes. There is, in fact, a precedent for that. Not actually a precedent, but that's what happened when DeLaurel (ph.) went out of business. DeLaurel left us with





THE WITNESS: (cont'd.) a number of cancer claims, but there was no industry left there and in fact all industry did in fact bear the cost of those claims.

DR. DUPRE: Can I just ask you to explain one little thing, since you are mentioning the DeLaurel case, are you talking about an instance here where the firm left Ontario, or a parallel to this case - namely, they closed a particular operation that has been related to those cancers?

THE WITNESS: DeLaurel did not leave the province and operate elsewhere, to my knowledge, but they didn't continue to operate anything else in the province as well.

We haven't had an exact situation where we have taken all of the costs of a firm that has gone out of business and charged all of it to all industries.

In fact, through the disaster reserve, probably the major portion of it has been charged to all industry, but never the hundred percent of the cost.

Is that correct, John?

MR. NEAL: If I may make a comment, as you may be aware the Board has substantial assets. At the present time they are in the order of one point seven billion dollars, and the reason for these assets are to pay for the ongoing costs of claims that have already been incurred, and there is no doubt that part of the eight hundred and thirty-one thousand dollars of accident costs in 1981, part of those were specifically reserved and there is money set aside for them.

The problem, of course, in this instance is to the extent that those costs are asbestos costs, asbestosis costs, industrial disease costs, which to a large extent, because of the latency problem, are not reserved. But these costs here, it should be emphasized, include the broken legs and the back problems, etc. They are not just asbestosis costs here, so some of them have been



MR. NEAL: (cont'd.) reserved subject to legislative amendments, obviously, which cause problems.

5 DR. UFFEN: Incidentally, where do the lung cancers and mesotheliomas fit? Under asbestosis or along with the broken legs?

MR. NEAL: They are all inside the eight thirty-one.

DR. DUPRE: They are all inside the accident costs?

10 MR. NEAL: The only accident costs which are ever separated are silicosis costs in the mining industry, where we have actually set up separate rate groups. But with that one exception, industrial disease costs and injury costs are grouped together in a broken-leg type rate group, if you wish.

15 DR. UFFEN: I just wanted to get clear on...when we use the term asbestosis to identify a relative proportion - point six nine observations from table two - does the term asbestosis mean specifically asbestosis, or does it mean asbestos-related disease?

Do you follow me?

MR. NEAL: I'm not sure what you are referring to.

20 DR. UFFEN: On the fourth page, entitled Observations from Table Two...

MR. NEAL: Okay.

DR. UFFEN: In the middle of the page there's an analysis that allows you to make an estimate of what proportion of the total accident costs can be attributed to asbestosis.

25 All I want to try to get clear in my mind is whether that term is specifically asbestosis, or does it include other asbestos-related industrial disease?

MR. NEAL: We will have to get back to you on that. The Board's statistical area prepared those numbers, rather than my own people. So I can't give you a definitive answer.

30 DR. UFFEN: The reason why I would ask such a, what might appear to be a trivial question is, what exists now and what



DR. UFFEN: (cont'd.) exists in the future may be different because of different latency periods, etc. for the three main categories of disease that we are concerned about.

MR. NEAL: I don't consider your question as trivial. I think we should get you the answer to that one.

DR. DUPRE: Can I pursue this a little bit more?

MR. LASKIN: By all means, Mr. Chairman.

DR. DUPRE: Let me either display ignorance or find clarification by asking you about how accident costs are arrived at.

Now, as I understand it, the basis for arriving at the costs that are shown for any rating group is section one zero four, subsection one. Is that correct?

(REPORTER'S NOTE: No audible response.)

DR. DUPRE: And if I read section one zero four, subsection one correctly, there are basically three cost components. In any given year one cost component is the Board's administrative expenses. A second component is the cost of claims in that year. And the third component is to pay the future costs that arise from all claims made in that year.

MR. NEAL: Reserving them, in other words. Setting up reserving.

DR. DUPRE: Right.

MR. NEAL: Yes.

DR. DUPRE: Now, at this point, if you will bear with me, I will make the following observation: that what I am looking at here with respect to this anomaly that industrial disease poses, what I am looking at, I would take it, is really the product of a financing scheme that is geared to what I am going to call true accidents, because accidents, of course, take place in the year in which they take place, and if you had a universe in which only true accidents happened, we wouldn't have the kind of anomaly that we are looking at because, of course, a firm will cease





DR. DUPRE: (cont'd.) operations in a particular year.  
Its payroll will drop to zero, its contributions will go to zero.  
5 But of course its costs will also go to zero...

MR. NEAL: Mmm-mmm. Can you just stop there?

Even in accident claims there's a time lag for the  
determination of permanent disability costs of two to three years,  
so in accident claims as well as industrial disease, there is a  
latency period. It is not as long, but it is there.

10 There is no employer that truly goes out of business  
as of day one, and ceases to contribute to accident costs as of that  
same day. There is always some sort of carryover of costs, even  
for ordinary accidents.

DR. DUPRE: And that the remaining firms in the group  
15 will have to pick up?

MR. NEAL: In every case, because of the emphasis...the  
whole Act is based on collective liability...it's a sharing of  
costs. That has been the emphasis, not individual charging of  
employers. That's the basis for the whole collective liability  
scheme.

20 DR. DUPRE: Okay. Now, what I am going to postulate...  
and I guess the question that I am going to have after I give you  
this postulation is, tell me if I'm out of my tree or not...what I  
am going to postulate is that of course in the accident situation  
you do correctly point out that there is a certain latency in fact  
in that true accident situation, but what I'm going to postulate  
25 is that that true accident latency effect is relatively marginal,  
is very likely to be relatively marginal, and hence perhaps well  
something that...you know, is something you spill before breakfast  
in terms of the amount of money that is involved in most of these  
rating groups, and collectively that rating group might as well  
30 bear it.

In any event, it's going to be common to nearly all



DR. DUPRE: (cont'd.) rating groups in that true accidents are indeed common to all such groups.

Am I still in my tree?

MR. NEAL: Yes, you are dead on.

DR. DUPRE: Okay. Now, let me continue with this exercise in tree climbing, but I want to make sure I'm staying in my tree.

As I see it, the problem that this gives us when we look at the industrial disease situation, and of course the very long latency effect here, coupled with - when you think of something like asbestosis - the progression of the costs, because to the extent that the disease is progressive, to the extent that the impairment ratings over the years go up, to that extent, of course, those costs go up as well, what you are looking at in the industrial disease situation is that at the moment the financial system that is in place potentially can inflict quite high costs for ten, fifteen, to twenty years, to those firms who have remained in the rating group but may have had negligible instances of disease.

Would that be...

MR. NEAL: I think that's a fair statement in theory.

There is another anomaly in the rating situation, which I think I should point out to you.

While what you are suggesting is a factor and does affect future generations of employers perhaps more unfairly than it should because of our inability to predict accurately, what is even more significant in terms of the effects on future generations of employers is the continuing ad hoc indexing of pensions, which we are unable in the present statute to reserve for, and that...you pointed out that that's an equal situation in all industry, and that is so, but in terms of a reserving problem for the Board, it's a greater problem than the one you are describing.





DR. DUPRE: Right. But it is not an equity problem.

MR. NEAL: No, it is not an equity problem.

5

DR. DUPRE: Right. But what I'm after here was the point of equity among employers.

THE WITNESS: Well, may I...I'm sorry, sir.

DR. UFFEN: I was going to pursue this just one step further, but I didn't want to interrupt your train of thought.

10

THE WITNESS: Well, I was going to ask our actuary, if I might, his perception of the real implications of equity when you get down to the nitty gritty of the dollar effect, and I think he could help us.

I think we may tend to overdramatize the dollar effect of this, but I would like him to speak to it.

15

MR. NEAL: On the concept of equity, the present system's inability to fund future amendments, predictable ones - i.e. preserving purchasing power of the injured worker - is creating inequities. Obviously it's a political issue as to whether those are appropriate or not, but in relative magnitude terms they dwarf the problems of inequity generated by industrial disease. So in relative terms, the inability to forecast the reserves that you should be building up during the exposure period - so that you've got the right amount of money at the point it becomes a claim, so it can then run off the twenty or thirty year payment period following that - is quite minor relative to this problem of not being able to prefund for future inflation.

20

25

DR. DUPRE: That's correct. But again, you see, I want to stick to the equity point, because the problem of trying to fund for future inflation is one that applies to the whole of the revenue side of the WCB operation.

30

THE WITNESS: To the extent that every industry is affected rather than just a few, it's a different kind of equity problem.



DR. DUPRE: Exactly. And to the extent, of course, that all firms, whatever their rating group, are basically in the same boat.

THE WITNESS: By making the kind of policy decision which you talked about earlier, of not charging the industry but spreading it over all industry, we would make them the same.

DR. DUPRE: Right.

DR. UFFEN: For me to understand this, I need to know one more thing, though, and that is how the reserve is built up and what happens to it.

The five cases that are in front of us here all show a cost perceived ratios for the industry of about point seven five.

In other words, there is an accumulation of a considerable sum of money, revenues, in excess of the annual expenditures.

No? What's the difference? Where does it go?

MR. NEAL: When we compare accident costs with receipts, we are...in the accident costs we have not included the administrative costs of the Board, we have not included the administrative costs of the safety associations, we have not included the costs of legislative amendments, which are the three major items. So even on a cash basis, the ratios that we show in this particular report are not indicative of the asset build up.

DR. UFFEN: Okay. That's important.

MR. NEAL: But we very much do have an asset build up in the system, because the obvious question is where did we get our one point seven billion dollars of assets from in the first place, and the answer to that is that if you ignore future legislative amendments for inflation, workmen's compensation in Ontario, and in fact in every province in Canada, is financed on a fully-funded basis. In other words, it is the intention that the 1982 premium cover the costs of 1982 accidents, not the cost of 1982 awards which



5 MR. NEAL: (cont'd.) is what is being reported here as accident cost. So we are looking at a government program with a fully-funded philosophy.

DR. UFFEN: So we really need to have the definition of accident costs in big red letters on the front here, so that we don't misunderstand that.

10 DR. DUPRE: And let me see I'm sure I understand it now, because now I go back to section one zero four, one.

Now, let me read it:

"The Board shall, in every year, assess and levy upon the employers in each of the classes such percentage of payroll or such other rate or such specific sum as, allowing for any surplus or deficit in the class, it deems sufficient topay".

15 Okay. Number one...and just writing in the number one here..."The compensation during the current year in respect of injuries to employees in the industries within the class".

MR. NEAL: Yes.

20 DR. DUPRE: So that is this-year claim costs.

MR. NEAL: Yes. And that is accident cost.

DR. DUPRE: Right.

Number two: "Provide and pay the expenses of the Board and the administration of this part for that year".

25 So that's this-year administration costs.

MR. NEAL: Mmm-hmm.

DR. DUPRE: Number three: "Maintain a reserve fund to pay the compensation payable in future years in respect of claims in that class of accidents happening in that year".

30 MR. NEAL: Yes.





DR. DUPRE: Number three being next year's costs, future costs of this year's accidents.

5 MR. NEAL: Yes.

THE WITNESS: Now, Mr. Chairman, read one zero seven.

DR. DUPRE: Okay. But on the way there, I've listed one, two, three out of one zero four, one, so when I look at the figures that are under accident costs in Appendix A, to make sure that Dr. Uffen's point didn't escape us, all I'm looking at is the costs of this year's accidents in that year?

MR. NEAL: No. This year's awards on this year's and all prior accidents.

DR. DUPRE: This year's awards...

15 MR. NEAL: On this year's and all prior year's claims.

DR. MUSTARD: That were not acted on in previous years.

MR. NEAL: In other words, a 1960 claim that gets a pension award in 1982, is a 1982 accident cost.

DR. DUPRE : I see.

20 But at this point, then, what you are telling me is that the accident cost figures you have here are...

MR. NEAL: A mish-mash.

DR. DUPRE: Yes, they are mish-mash. Because in point of fact, if I understand it, if the...what's the term...if a percentage-of-payroll levy in any given year, given one zero four, one, has to reflect one plus two plus three, that percentage of payroll levy for any given year has of course...well, took into account, because of number three, the downstream costs of the accident that happened in 1960, in 1960, right?

25 MR. NEAL: Yes. But, and there is really an element zero, before you get to where you started numbering them there is also the statement that is saying 'allowing for any surplus or



MR. NEAL: (cont'd.) 'deficit in the class'. The class already has funds inside it to pay for this year's awards on prior year accidents, and that's built-in to the equation also.

DR. DUPRE: Yes, that I would understand.

Okay. Now, Mr. MacDonald said I had better take a look at section one zero seven. May we look at section one zero seven:

"If the amount realized from any assessment is insufficient for the purpose for which the assessment was made, the Board may make supplementary adjustments to make up the deficiency".

Section one zero six applies to "...such and such..." "...that the Board may defer assessing for such deficiency until the next annual assessment is made, and then include it in such assessment."

THE WITNESS: That, in fact, is our practice - the latter situation.

DR. DUPRE: Now I'm not sure what I've just...if I understand what I have just read, but basically one zero seven to me simply sounds like a provision that gives me, the Board, the flexibility to make some supplementary assessments downstream.

THE WITNESS: It was originally envisaged, I think, that there should be supplementary assessments based on the years, going back into the year in which the liability was incurred, and based on the payrolls of that year.

But in practice over the years what in fact has happened is there has simply been each year, to make a new assessment of the position that each classification is in, having regard for its present balance, experience during the last year, and issue a new assessment that has a correcting mechanism in it.

DR. DUPRE: Let me see if I understand something. Did I hear you say, Mr. MacDonald, that it was though, at least at one time, that under one zero seven the Board might make some





DR. DUPRE: (cont'd.) supplementary assessments by going back to earlier year payrolls?

5 THE WITNESS: If I look back at the history of the legislation and look at intent, if you go back as far as Sir William Meredith, you could read into it that the concept could have been that they were going to keep on assessing over and over on the same year, but the second part of it suggests you can defer it and do it as part of the next year as well.

10 I'm simply reporting it as a fact this has always been to set a new assessment rate each year, and not try to reassess previous years.

15 DR. DUPRE: You see, I'm just interested in the kind of statutory basis you have for flexibility, because now I'm going to ask you the following question: With respect, you see, to this industrial disease anomaly that we have noted, are you suggesting that one zero seven would make it possible, if the amount realized from any assessment was insufficient for the purpose for which the assessment was made, are you suggesting that one zero seven legally would make it possible for the Board to pick up a rating group - let's say number one thirty-seven - and say  
20 okay, we are going to make a supplementary assessment on that group. Your payroll, say that existed in 1971, in which...in this instance a firm which is still in this jurisdiction, it has closed that operation, but because it had a payroll back there in 1971 would then be able to...would then have to contribute to that  
25 assessment and compensate for the equity problem I have just pointed out? Does one zero seven make this possible?

THE WITNESS: I believe the words would permit that, yes.

DR. DUPRE: I see.

30 THE WITNESS: However, you could not individually charge that employer only. You would have to charge every person



THE WITNESS: (cont'd.) in the classification.

5 DR. DUPRE: Oh, yes. But that employer would be at least making a proportional contribution to that...

THE WITNESS: Yes, I believe the words are broad enough to do that.

DR. DUPRE: That would get you back to the days, at least, when it had a payroll.

10 DR. UFFEN: May I ask, how do you establish your disaster reserve...what was the expression you used a little while ago?

THE WITNESS: Disaster and rate stabilization reserve.

15 DR. UFFEN: How do you establish it? Under what legislative authority, and could it be used as, say an authority to establish latency stabilization funds?

THE WITNESS: You better deal with that, John.

MR. NEAL: Without giving you a legal answer... actuaries hate to use legal answers...

DR. UFFEN: Lawyers are all right today.

20 MR. NEAL: ...the conceptual use of the rate stabilization fund which is financed by taking a small slice off the top of every employer's assessment rate in arrears, at the end of the year we know how much we need to spend on it and once we have determined that, we can work out the percentage. So it's not a pre-event determination.

25 The idea of that fund is to avoid undue burdens, and to the extent that we have already perceived that rate group one thirty-seven has an undue burden with regards its existing claims versus the assets there to pay for them, the present procedures provide some financing towards those current year accident costs. To the extent that there are special circumstances, 30 the fund has also been used with the discretionary power to the Board to say this is a special circumstance which cannot be addressed



MR. NEAL: (cont'd.) through mathematical formulas, and we will take this further step.

5 The most obvious examples are where a disaster occurs, and many, many workers are injured, in an event which you can hardly hold the employer accountable for. The most obvious example is the Ottawa bridge, which was back in the sixties when it collapsed, and many workers were injured. All of Ontario's industry paid for those costs, rather than the particular contractors  
10 who happened to be the employers in the case.

DR. DUPRE: Can I just ask you this: What is the statutory basis for the disaster and rate stabilization fund?

THE WITNESS: Section one zero eight, one.

DR. DUPRE: Okay.

15 THE WITNESS: That is the basis for both the disaster and rate stabilization reserve, and the second injury fund.

MR. LASKIN: Is it one zero eight, two isn't it? One zero eight, two?

20 THE WITNESS: Well, one described the circumstance, disaster or other circumstance, and then two provides for how it is funded.

At one time the Board maintained a dollar fund on its balance sheet for each of these circumstances, disaster and second injury. We now simply calculate the payments which are made in the current year in each case, and transfer assessments, and we  
25 keep the thing at a zero position by that policy.

DR. DUPRE: Now, just to make sure I've got the funds straight, there is the disaster and rate stabilization reserve. There's also...?

THE WITNESS: The second injury fund.

30 DR. DUPRE: The second injury fund. That's also based on section one zero eight?





THE WITNESS: Right.

5 DR. DUPRE: Can I just ask you again to tell me what the second injury fund is?

THE WITNESS: If there is...in the case of permanent disability, if there is a pre-existing condition which has enhanced the disability, then that portion of the cost of the claim which can be attributed to that pre-existing condition is charged to the second injury fund.

10 The best example of that is a person who has already lost the sight of one eye. The loss of a single eye is eighteen percent. The cost of another eye is really a hundred. Eighty-two percent of that claim would be charged to the second injury. There are many variations of that. It goes down to back cases and every kind of case where there is a pre-existing condition.

15 DR. DUPRE: I take it that the cost of both the disaster and rate stabilization reserve under the second injury fund is borne by all industry, precisely because in terms of one zero four, one these funds are viewed as the administrative expenses of the Board, in terms of arriving at...

20 THE WITNESS: We don't consider them administrative expenses. We consider them accident costs.

DR. DUPRE: I see.

THE WITNESS: Or allocation to reserves for the...

25 DR. DUPRE: But they are not assigned by classes of rating groups?

THE WITNESS: The classes or rating groups get the recovery specifically individually as a rating number. They do not come down to the individual credit of individual employers.

DR. DUPRE: Okay.

30 THE WITNESS: There is one exception to that. In the case of second injuries, the individual employer has the credit come down to him if experience rating is in effect in his industry,



THE WITNESS: (cont'd.) and the costs are reduced by the second injury fund transfer in that instance.

5 DR. MUSTARD: Can I take you back to Appendix A, and the one thirty-seven group is an example. I think I followed some of what you said in response to the various questions, but if I look at the group under firm and accident costs, you begin in 1971 - a hundred and twenty-one thousand, and you end up in 1981 with eight hundred and thirty-one thousand.

10 What do those figures for each year represent? Do they represent the awards, just the awards in that year?

MR. NEAL: Yes. They represent the dollar value of the benefits being awarded by the claims adjudicators to injured workers.

15 DR. MUSTARD: For that year?

MR. NEAL: Yes.

DR. MUSATARD: What about the carryover from the awards given the previous year? Where do those appear?

20 MR. NEAL: These costs include the capitalized value of pension awards, so these amounts are not cash, they are cash with regards temporary compensation because a claims adjudicator will award a worker another three weeks of benefit, so that's hard cash, and the same is true of medical aid costs, and rehab, but when it comes to pension awards, if we award a man a hundred dollars a month for life and he is age forty-six, the factor is about a hundred and forty per dollar or monthly pension, so the accident cost is charged with a hundred times a hundred and forty. It becomes the  
25 accident cost. That amount of money is, in effect, transferred to the pension fund and his monthly cheques of a hundred dollars are paid out of that lump sum which, of course, is earning interest all the time.

30 DR. MUSTARD: Now, let us suppose you have someone who is given an award in 1976, and he is given a thirty percent





DR. MUSTARD: (cont'd.) or forty percent disability...

MR. NEAL: Yes.

5 DR. MUSTARD: ...and in 1980, it's up to eighty percent.

MR. NEAL: So he get's another fifty percent...

DR. MUSTARD: And that would appear, that adjustment upwards would appear in that 1980 calculation?

MR. NEAL: In the 1980 accident cost.

10 DR. MUSTARD: I see. I see.

THE WITNESS: This, in effect, Dr. Mustard, is during-the-year accident costs and it is payments of compensation and medical aid and rehabilitation, but it is awards in the case of permanent disability, made during the year. But it's a during-the-year accident cost.

15 DR. MUSTARD: So each year represents the costs for that year and the costs for any continuing claim for the next twenty years? In other words, you are capitalizing it to be able to pay it out over the next twenty years, is that right?

MR. NEAL: Capitalizing the future pension payments, and not capitalizing the future awards to that claimant.

20 DR. MUSTARD: I mean the pension payments. Your ongoing costs ...

MR. NEAL: But only the pension payments to the extent that it has already been awarded. In your case it obviously didn't include the fifty percent increase in disability rating five years down the road.

25 DR. MUSTARD: And you will not have put in an inflation estimate when you started out in 1971, I presume, so you get caught like that.

MR. NEAL: That's right. With a factor of a hundred and forty. That's assuming an investment yield of seven percent which obviously you can't do now given inflation.

30



DR. MUSTARD: Now, if I turn over to industry classification, those figures tend to be increasing. Is that just because you've got more industry in there, or what's going on? Those costs, the accident costs to the firm are going up and down and I can see that's tied into the awards and how many...

MR. NEAL: An individual firm's record is bound to be unstable. It's not large enough.

DR. DUPRE: Incidentally, costs under industrial classification also means accident costs?

MR. NEAL: Yes.

DR. MUSTARD: Anything else?

DR. DUPRE: That is just the sum of the accident costs for all firms in a given group?

MR. NEAL: Yes. I believe that's simply a typing error or not putting the word 'accident'.

DR. DUPRE: Okay.

DR. MUSTARD: Now, can you explain to me why the receipts per firm are substantially less than accident costs and why receipts for industry classification are substantially greater than accident costs?

MR. NEAL: Primarily because of Johns-Manville's asbestosis claims.

In other words, the other firms in rate group one three seven do not have asbestosis claims, and the assessment rate is set based upon average experience, and Johns-Manville is not following the norm.

DR. MUSTARD: So that asbestosis effect is carried over to all the firms, which puts their rates up?

MR. NEAL: Yes.

DR. MUSTARD: That's created the big...

MR. NEAL: To the extent that it wasn't recovered through our experienced rating charges, which did amount to eight



MR. NEAL: (cont'd.) hundred and twenty thousand dollars, but relative to the whole problem it's only a part of the issue.

DR. DUPRE: The experience rating charges that you levied on Johns-Manville?

MR. NEAL: Yes.

DR. DUPRE: Okay. But now...

MR. NEAL: And would therefore refund it to other employers in the same rate group.

DR. DUPRE: Right. But now just pursuing what Dr. Mustard has drawn to our attention, when you look at rating group one three seven at that much higher cost-receipts ratio for the firm than for the industry, when you...well, what you are looking at in each instance is an indication of the extent to which, of course, because of collective sharing, the other firms in the rating group were, of course, contributing to costs incurred because of claims from Johns-Manville.

Now, when we look at 1980 and 1981, of course, the extent of that contribution is probably reflected in part in the extent to which the cost-receipts ratio for the industry group as a whole rises?

MR. NEAL: Yes.

DR. DUPRE: Even as, of course, what is happening in the J-M situation is that the cost-receipts ratio rises to infinity, correct? Because anything over zero is infinity, and there is the equity issue.

MR. NEAL: Yes. Well, to repeat Mr. MacDonald's opening statement in this regard, we have estimated that over the period 1971 to 1981, if Johns-Manville had been fully experience rated - in other words, had been required to stand on its own two feet - it would have paid us another six point two eight million, and therefore somebody else has paid that six point two eight million.





DR. MUSTARD: Can I ask just a little more clarification about the industry classification?

5 If you take...go back to about 1979, I realize this is probably the wrong language to use, but a simple way of describing it, you had a net surplus in that area of receipts over costs of about one point four million, if I read the table...you have five point nine, approximately, in receipts, and you paid out three point five million in costs.

10 MR. NEAL: So that's two point four.

DR. MUSTARD: Pardon? I got three point five. But anyhow, your receipts were greater than your costs.

MR. NEAL: Yes.

DR. MUSTARD: What do you do with the surplus?

15 MR. NEAL: We add it to our reserves to pay future payments on existing claims.

DR. MUSTARD: What fund is that?

MR. NEAL: That's our basic accident fund which has the one point seven billion dollars in it.

20 DR. MUSTARD: So that goes into the basic accident fund?

MR. NEAL: Yes. Which is in actual fact maintained at a rate group level, so...

DR. MUSTARD: So that's different than the other two funds?

25 MR. NEAL: Yes.

THE WITNESS: It's the sum of those funds.

DR. MUSTARD: Now is there any...are you running at a surplus in all your classifications?

MR. NEAL: We are running a cash surplus, yes.

DR. MUSTARD: Now, if we...

30 MR. NEAL: Which is not a surplus...

DR. MUSTARD: As I look at this table, and I'm sorry



5 DR. MUSTARD: (cont'd.) that my ability as an accountant is terrible, as is obvious to you, but if you look at the period before 1979, then, the Johns-Manville problem is creating a pressure on the other firms to increase their rates, it is being transferred over...

MR. NEAL: Yes.

10 DR. MUSTARD:...which is therefore generating a surplus in that industry classification on the effect of that firm, because if Johns-Manville was balanced in terms of this cost, then you wouldn't have that rate push on the other firms which aren't carrying the same, aren't producing the same accident burden.

MR. NEAL: But I wouldn't have the costs either.

15 DR. MUSTARD: Yes, but what I'm trying to get at is, the difference between costs and receipts, if you have a group of firms who are imparting equilibrium - that is, their receipts from and their accident costs were pretty closely tied together...

MR. NEAL: But they shouldn't be. The costs should be running at about sixty percent of receipts.

DR. MUSTARD: At what percentage?

20 MR. NEAL: At about sixty percent.

THE WITNESS: John, would you like to go over again the other factors that are there, and you mentioned them earlier but perhaps they didn't sink in.

DR. MUSTARD: But this is more than sixty percent here.

MR. NEAL: Yes. So these rates...

25 DR. MUSTARD: That's what I'm trying to get at, when you have a real wow in the system, does it push your surplus situation in that industry classification?

30 MR. NEAL: This rate group has been losing ground during this period of time. At the present time, and the figure used to be lower before we had legislative amendments, which...for inflation...which started in 1974, we need forty percent to cover





5 MR. NEAL: (cont'd.) administrative costs, safety association costs, the funding of second injury and rate stabilization, and the amortization of the cost of legislative amendments over a five year period.

10 Unfortunately, I don't have my little piece of paper here today to give you the percentages of those, but I could easily table them with you. But there is about forty percent of our premium that is required for things that are not recorded as accident costs.

DR. MUSTARD: And sixty percent for the accident costs?

MR. NEAL: Yes.

15 DR. MUSTARD: I was just trying to get at the impact of one firm being away out of whack, and its impact within that area, and I guess there is some kind of impact but there is no point in spending a lot of time on it at the present moment.

20 MR. NEAL: One could restate the industry classification's results there by subtracting Manville's out and seeing how the ratios go, and that probably is a pretty crude count of how much higher the assessment rate was, by just taking the ratio of the ratios. That would give you a very quick estimate of what it has been costing.

DR. UFFEN: By the way, who invests your reserve fund? Do you?

MR. NEAL: We have our own investment department.

25 DR. UFFEN: Is there a committee of the Board that deals with the investment of the funds?

THE WITNESS: There is a group of outside consultants who advise the Board's internal investment committee on the investment of these funds, and we have an investment fund manager on staff.

30 DR. UFFEN: And I heard you correctly say you do your calculation on seven percent?



MR. NEAL: For the purposes of accident cost charging. For reserving for the Board, we use a higher interest rate than that.

DR. UFFEN: Are you free to tell me what it is?

MR. NEAL: It's eight and a half percent at the present time.

The reason it is only eight and a half percent, for your information, is that we are making a partial allowance for future legislative amendments, to attempt to avoid this undue burden.

THE WITNESS: In fact it should be three percent.

MR. LASKIN: Q. Could you...I'm still not sure, and it may be me that's slow, but understand the second injury fund. Perhaps you could just look at Professor Barth's chapter three point two one, where he talks about it, and indicates its inapplicability to asbestos-related diseases.

Could you, Mr. MacDonald, just take a moment and read the first full paragraph and perhaps part of the next paragraph?

Is that accurately stated?

THE WITNESS: A. Yes, I think it's accurate.

Q. In the example that you gave the Chairman about the loss of an eye at eighteen percent, how does then the second injury fund work?

A. I think what Professor Barth is trying to say here is that you are not superimposing asbestosis on another disability. All you are doing is enhancing an existing asbestosis condition by further exposure, and therefore it isn't appropriate to use the second injury fund.

What we are really talking about is the coupling of unrelated disabilities which arise out of previous situations.

I don't know the parallel. I would say, for example, if somebody got asbestosis and they had a certain percent awarded



5 A. (cont'd.) for that particular condition, if they also had a back condition which made the total result something quite a bit higher, then in that situation you would use the second injury fund.

Q. Use it for what?

10 A. To relieve the employer where the last condition developed, of the enhancement arising out of the either hereditary or previous industrial accident or other accident disability that existed with that individual.

Q. So that the employer then would be encouraged to hire or retain the worker because he wouldn't have to bear the complete cost, or his group wouldn't have to bear the complete cost of the compensation payable?

15 A. As Professor Barth points out, this is common practice in all compensation jurisdictions in North America.

I think the Ontario jurisdiction goes much farther than any other jurisdiction, particularly as it relates to back cases.

20 John, do you remember the dollars involved in second injury last year? I think it's somewhere in the twelve million dollar range, or even higher.

MR. NEAL: It's in the order of fourteen to fifteen percent of total accident costs, which make it up in the seventy to eighty million dollar level...a very substantial amount of money.

25 DR. DUPRE: May I ask the following, which is: How you wind up defining what you call a firm for the purpose of assignment to a rate group class? The reason I ask is that, of course, in the J-M situation what we are looking at when we are looking at the transite pipe is not even at a plant within the firm, if I may use the economic language, but a part of a plant.  
30 That part of the plant became a firm for the purpose of being assigned to group one thirty-seven, and another part of that plant





DR. DUPRE: (cont'd.) became a firm for the purpose of being assigned to one of those other groups.

5 THE WITNESS: There are approximately a hundred and twenty different industrial processes described within our rating classification, and an individual legal entity can be engaged in any number of those businesses. As long as they are able to segregate the payroll for that operation, we will classify them in those different operations.

10 It's a question of carrying out the industrial... manufacture or industrial process that is described within the classification.

15 Here we have the description of industries that they have been in. In rate number zero ninety-one, they are involved in mining, reduction, smelting and treatment as a firm. They have been in the manufacture of sewer pipe, which included artificial bricks, cement blocks, plaster board as well. They have been in the manufacture of glass and glass products, and they have been in the business of manufacturing cordage and asbestos goods, all of which are industries described within their classification.

20 DR. DUPRE: Now, do these classifications have anything to do with what appears on page...from pages sixty-nine to eighty-one, in the regulations of the Act, namely schedule one, or is this a different set of classifications?

25 THE WITNESS: That is a summary of the same classifications. There is a rating book which describes subgroups within these particular classes, which have individual rate numbers.

Do you have a rating book with you, John?

MR. NEAL: No.

MR. RIDDELL: I do.

DR. DUPRE: Oh, yes. I have seen that book.

30 On the basis of what part of the Act does the Board arrive at the groups that are in this booklet?



THE WITNESS: I believe it's under eighty-one that the Board has authority to do this...seventy-five.

5 DR. DUPRE: Now, when it comes to assigning a particular part of an operation to a particular group, does the firm or does the company involved itself apply to put its different operations under different rating groups, having regard to, you know, the guidance of your manual here?

10 THE WITNESS: That is one of the reasons which it can happen. It is the responsibility of the auditors who are auditing the payrolls of the various firms in the province to carefully examine their operations and their payrolls to determine whether or not they are involved in any of the industries under the Act, and it is most often as a result of an audit or an examination of that nature that a reclassification might take place.

15 A new industry will report its operations to us, and describe it to us. We will give them a preliminary classification and then it will be reviewed by our auditors.

DR. DUPRE: Do firms ever appeal the rate group industry classification to which they have been assigned?

20 THE WITNESS: Yes, they do.

DR. UFFEN: There is a statement in Barth, right close to the one we were looking at just a minute ago, which appears to be incorrect to me. But can I ask you to check? It's three point twenty, the bottom of the page. It's just in front of the section Injury Enhancement.

25 It says: "Benefits for asbestos-related disease are paid by the WCB. Costs for such claims are charged back to the last employer where the worker had been exposed to asbestos".

From the discussion we've just had, it would appear that the costs are charged back to the...what do we call it...

30 DR. DUPRE: To the rating group in which the last employer was assigned.





DR. UFFEN: Yes. Not necessarily where he was exposed to asbestos.

5 THE WITNESS: We are talking about two different things. In every instance the costs of a claim are charged to that employer within a rate number, by virtue of that charge, and they are also charged to the rate number.

10 When we are talking about conditions such as asbestosis and silicosis, there is a policy which has been in existence for quite a number of years that if an employee has been exposed in a number of different industries to that particular product or that particular process, the employer where the last exposure occurred will have the claim charged to him. We do not pro-rate... for example, let's say a man has worked for ten different mines and has gotten silicosis over a period of time, this is after  
15 discussion with industry itself and is a practice of long-standing, it's always charged to the last employer.

So you are talking about charging of a claim where exposure has occurred over a number of employers. But it is charged to the individual employer, and thereby to the rate number.

20 Now, the business of accrediting, which is the opposite side of which we are talking about, the only crediting that takes place for second injury fund is where experience rating is in effect. Otherwise, the credit comes to the rate number and in the case of disaster reserve, there is no individual credit to the employers - just credit to the rate group.

25 DR. UFFEN: Do you mind a 'what if'?

What if there are no employers in the province using asbestos, but a claim for asbestosis, a legitimate claim, comes forward? It can't be charged back to the last employer if there are no longer any employers in the province using asbestos...they  
30 might have been, but if they are gone.

THE WITNESS: Well, the employer doesn't have to be



5 THE WITNESS: (cont'd.) in business to have the claim charged to his record. We would charge that particular claim to the last employer who was in business in the province, where the exposure occurred.

DR. UFFEN: How would you collect it?

THE WITNESS: If there is no industry there any longer, as in the case of DeLaurel, all industry would pay it by virtue of it being charged to the disaster reserve.

10 DR. UFFEN: What about a reorganization where the organization still exists, but under a new name? I'm thinking of Johns-Manville with its reorganization two years ago.

THE WITNESS: If the exposure occurred under the old organization, the claim would be charged to that old organization I believe.

15 DR. UFFEN: But how do you collect from an old organization that doesn't exist?

THE WITNESS: You don't. You collect from the industry in which that classification was. That's the anomaly and the problem...

20 DR. UFFEN: So we are back to half an hour ago where Johns-Manville reorganizes, takes the asbestos operation out of the Scarborough plant, moves it to Quebec or somewhere else, renames the corporation, reorganizes it, and the cost of the claims get charged to the rest of that classification and can't be claimed from the existing Johns-Manville organization?

25 THE WITNESS: That is correct.

30 If you want an exact case, which hasn't had any claims yet, but...I won't name the exact firm...but there is a firm in Windsor who have closed down their operation in Windsor, and are no longer operating. If there are any, ever any cancer claims that occur, they will be charged to that old firm number of that particular company and will be a charge to that industry.



DR. UFFEN: Can I ask what classification...that industry would be brake linings, I presume...appears under? I've been trying to find it in your book.

THE WITNESS: It's in class seventeen, and if you want to give me the rate number, I'll show it to you.

MR. LASKIN: I think you can feel safe in naming the firm, Mr. MacDonald.

DR. MUSTARD: We've had testimony...

THE WITNESS: It's rate five fifty-five.

DR. MUSTARD: So there could be asbestos claims appearing in five fifty-five as well, and so therefore...is that right? There are brake linings in class five fifty-five, and we know that there is a brake lining plant in Windsor that is closed, that made brake linings, so therefore we could presume that you could have asbestosis claims or mesothelioma claims coming in both in the one thirty-seven classification and the five fifty-five classification, where you no longer have a firm that employed those people, available to...

THE WITNESS: Yes. That's theoretically possible.

DR. DUPRE: I want to make sure I understand the situation with respect to Bendix, at this juncture.

To follow Dr. Mustard by...not repeating his question...can I ask you this? If there are some claims that materialize on behalf of Bendix, will those claims, will the cost of meeting those claims be assigned to the firms that remain within rating group five five five, or will they be assigned to industry as a whole?

THE WITNESS: At the present moment the policy has been to charge it to the rate number where the firm was previously.

You have raised a point of whether or not the Board could have a policy of charging such claims to all industry, and my answer to that was yes, they could, and it may well be that we





THE WITNESS: (cont'd.) will want to consider that if it became a significant factor in the future.

5 DR. DUPRE: I just wanted to comment on that, because you are talking once again about equity among employers. What would argue in favor of a general policy of going to industry as a whole as opposed to the rating group, when an operation leaves the rating group, is at least the following: If we take the  
10 Johns-Manville case, at least insofar as Johns-Manville remains a part of industry as a whole - however marginally - its own assessment will reflect the fact that because industry as a whole was paying for their closed operation they were at least making some contribution.

15 THE WITNESS: And they have, to the extent that the disaster reserve has already been used to ameliorate the cost of their claims.

DR. DUPRE: All right.

Now...okay, I have another question but I'm going to give it back to Dr. Mustard.

20 DR. MUSTARD: I know you answered this question, I think, but I don't think I really grasped the nature of the answer to why you can't do it.

Johns-Manville still exists as a corporation in the province of Ontario, so why can you simply not charge them for the costs incurred by their employees in their asbestos operation?

25 Why can't you simply make sure that corporation, which had several firms under the definition here, but nevertheless just go right to that organization and say look, we realize you have gone out of asbestos, but these claims are going to come in down the road and we are going to ask you to pay the costs of them from your operation?

30 THE WITNESS: The system doesn't work that way. We have got a system of collective liability.



DR. DUPRE: And that's what the Statute permits.  
The Statute does not permit what Dr. Mustard is...

5 THE WITNESS: The Statute only permits what you  
are suggesting for schedule two employers.

DR. MUSTARD: Okay. In other words, that 'firm'  
definition that you use is the restriction under which you have to  
exist?

10 MR. NEAL: To the extent that experience rating  
modifies it, and experience rating only works whilst there is a  
payroll there to do something with.

DR. MUSTARD: I realize that, but Johns-Manville  
still has a payroll. That's what I'm trying to get at.

15 But I see what you...because you've broken down  
into segments called 'firms', for your classification process,  
you really can't go at that, and it's the Statute that prevents  
you from doing that?

20 MR. NEAL: Yes, though I think as has already  
been mentioned, Professor Paul Weiler is advocating that that  
problem be rectified, and that when a firm goes out of business  
in the province of Ontario..and I think by that we can talk about  
firm rate...that it should pay the Board a lump sum in the event  
that it hasn't paid it enough already.

25 This was part of his plank, I believe, of saying  
the program doesn't need to be fully funded if it's fully indexed,  
and one of the ways you can rectify that is if the major firm  
in particular goes out of business - such as the Manville situation -  
that you can come in and charge them all or part of what you didn't  
get.

30 DR. MUSTARD: I prefer to reword your statement.  
If an organization drops one line of operation which is in a  
specific classification, the organization hasn't gone out of  
business - just dropped a product line, it's when that occurs that  
you've got a problem, because the organization is still here and





DR. MUSTARD: (cont'd.) the organization is still making money and still has payrolls.

5 MR. NEAL: You have a resolvable problem and one of our concerns is if the entity goes out of business, who are you going to send the invoice to.

10 DR. MUSTARD: I'm not sure if the statutes, even the present ones, for an organization that is in existence but has dropped a product line, you still can't get at it to pick up the costs.

DR. DUPRE: Okay, let me get at that one again by taking yet another line, just to make sure I understand the full extent of the anomaly.

15 We will take the instance, the theoretical instance, of an employee who, in 1984, incurs an asbestos-related claim. That individual, at the time he makes the claim in 1984, is an employee of Johns-Manville, but in an operation of Johns-Manville that is still going and is assigned for the sake of the argument to rating group one fifty-three.

20 Now, as I understand it, the way the current system operates you will, as Professor Barth points out, of course look for the last employer where the worker had been exposed to asbestos.

25 Now, as I understand your system, it will turn out that that employer is not the Johns-Manville that shows up as an employer in rating group one fifty-three. That employer is going to be the Johns-Manville that once existed as an employer in group one thirty-seven. Correct?

THE WITNESS: You have cited that he is getting exposure in his latter position as well, though?

30 DR. DUPRE: No. No, no. I'm assuming that he is now in the nonasbestos-exposed operation that's in one fifty-six.

THE WITNESS: In that case, it goes back to the...



DR. DUPRE: It goes back to one thirty-seven, and it's the other employers in one thirty-seven that will pick up the tab. That's the end of the problem.

MR. LASKIN: Q. Does that mean that really the Board does not utilize subsection five of section one twenty-two, and it's a slightly different question, but which allows you to spread the risk, as it were, amongst all employers to whom an employee might be exposed, and it wouldn't necessarily arise...he could have only been exposed at Johns-Manville, but if he worked for three or four different establishments, all of which, during all of which he had asbestos exposure, there appears to be power to distribute the risk.

THE WITNESS: A. It is clear that the power is there to pro-rate the cost over all employers where there is exposure. It has been the practicality of the administration of such a power that has prevented us doing it.

It's really at industry's request, total industry's request, that it is charged to the last employer.

This becomes a particular problem if you have the exposure in more than one province, and we have agreements with various provinces to share costs of those kinds of claims because of their special nature.

In many cases, though, the practice is to have the employer of the province where the last exposure occurred to have the full claim charged to him.

MR. LASKIN: Q. What if you had an exposure with an American employer?

THE WITNESS: A. You ignore it completely. It just doesn't exist.

Q. It just doesn't exist.

DR. MUSTARD: Can I ask a simple-minded question, which I'm sure you have sorted out all the problems around it?



5 DR. MUSTARD: (cont'd.) With this thing we have been discussing, we gave the theoretical consideration of the Bendix Corporation in Windsor, which may have some claims related to it come up, and we do have the practicality of the Johns-Manville situation where several people have suggested to us there will be further claims coming in. Have you made any estimate of what you might think are going to be your future claims that are going to come in for which there will not be firms to which the liability can be assessed?

10 MR. NEAL: No, I haven't. There is a theme here which is concerning me to some extent, that perhaps I would like to straighten the record out on.

15 In the Mansfield (sic) situation, when the claim comes in in 1984, you are expressing deep concern that Mansfield (sic) isn't around to pick it up.

If Mansfield (sic) was around to pick it up, it doesn't, under the present system - with the exception of experience rating - pick it up anyway.

20 All we are talking about is that the 1984 or the 1985 premium will be higher because of that claim, and to the extent that Johns-Mansfield (sic) may have been ten percent of the total payroll for one thirty-seven, Mansfield (sic) will have picked up ten percent of the cost of the claim.

25 But the balance of industry would still have picked up ninety percent of it, and all that has changed is that it has gone from ninety to a hundred. So I don't think you should overemphasize the issue that Mansfield (sic) isn't there anymore.

30 If we don't recognize it as the asbestosis is accumulating, we have missed the boat anyway, whether Mansfield (sic) continues to exist or not, because the other scenario is - what if Xerox Corporation, or whoever, starts the asbestos pipe operation in Scarborough next week? The industry is still there, we've just





MR. NEAL: (cont'd.) got a totally new owner and the same problems occur.

5           Within the collective liability system, the thing is pretty well being handled. I don't think it not being there anymore is quite as big a problem as some of your statements seem to apply.

10           DR. MUSTARD: As long as it stays as a small percentage, your collective system can handle it. But if it became a larger percentage, surely you would have to become concerned.

15           MR. NEAL: Well, I think an excellent example of that is the gold industry. Before the price of gold escalated dramatically, and in fact during the time when the federal government had its special grant to try and maintain, keep some of Ontario's gold mines open, the work force in the gold industry declined dramatically in this province, and we as a Board helped, if you like, to keep that industry in business by taking a fair chunk of their costs and charging them to rate stabilization, because you are talking about a shrinking situation, the exposure  
20 isn't there anymore to cover it, we have programs to cover it.

          If this one three seven asbestos problem is considered large enough, we will do exactly the same thing. So I think we do address them.

25           THE WITNESS: I think it is our perception that in terms of the outstanding claims that are still there, the major part of this problem is behind us, we believe.

          DR. DUPRE: Although certainly the figures for 1981 in rating group one three seven give you no basis for that optimism whatsoever.

30           MR. NEAL: You are presuming those costs are asbestosis costs, and I can't give you a breakdown of the 1981 figure.



5 DR. DUPRE: No, I realize that. But I'm simply making the...well, now, wait a minute. No, I'm not sure about that, because let me put this to you: When I look at 1981, those firm costs for 1981, I think that I can presume with one hundred percent accuracy that there would be absolutely no true accident costs in there...

MR. NEAL: There will be a great...

10 DR. DUPRE: ...since they weren't operating, how could they have had some accidents?

MR. NEAL: There will be a great deal of pure accident costs in 1981, because as we already mentioned to you, the average permanent disability awards for the true accident is not awarded for two or three years after the date of accident.

15 DR. DUPRE: Oh, that's the accident latency effect, and it might...

MR. NEAL: In fact, that's right where it peaks for 1978/1977 activity.

THE WITNESS: What I'm making my comment on is the present claims that have been made, that we know about.

20 DR. DUPRE: Frankly, I don't think there is much point in going on with this, but I'm far from certain your accident latency effect would be operational in this case, the reason being simply the following: You see, if I look at J-M, that operation, three years ago, back in 1978, correct? The revenue in the rating group from J-M for that year - a hundred and ninety-  
25 seven thousand - would of course indicate to me that in that year they had a relatively low payroll, therefore relatively few employees, therefore likely relatively few accidents to incur eight hundred and thirty-one thousand dollars worth of latent accident costs...

30 MR. NEAL: You read figures very well.

THE WITNESS: We have already agreed, so we'll give





THE WITNESS: (cont'd.) you a breakdown.

DR. DUPRE: Okay.

Counsel? Do you have a few areas...

MR. LASKIN: Could we perhaps take a very short recess and I'll just canvass that and perhaps canvass with you where we go from here in terms of our scheduling?

THE INQUIRY RECESSED

- - - - -

THE INQUIRY RESUMED

DR. DUPRE: Now we may resume. If you please, thank you, counsel.

MR. LASKIN: Can I, just to keep our records straight, Mr. Chairman, give Mr. Neal's document an exhibit number as exhibit five in this phase, phase four, and let's mark this red booklet, since we referred to it, as exhibit six.

EXHIBIT #5, PHASE 4: The abovementioned document was then produced and marked.

EXHIBIT # 6, PHASE 4: The abovementioned document was then produced and marked.

MR. LEDERER: Mr. Chairman, before you go on, I've asked Mr. Laskin this question and he has said it's not necessary, but perhaps I should put it to you: Do you wish, in view of the number of questions that Mr. Neal has responded to, do you wish to have him identified more specifically, for the record, or do you think you have enough information?

DR. DUPRE: Counsel, what is your...

MR. LASKIN: I'm content. We have identified him as the Board's actuary and the author of that report, and I'm content with that.



DR. DUPRE: Thank you, Mr. Lederer.

5 MR. LASKIN: Q. Mr. MacDonald, there is just one other matter that I want to cover with you, and not in any great detail, and that's the question of the Board's rehabilitation programs, and I just want to make sure we have clear, first of all, the statutory basis for those programs, and am I correct that those programs are administered by the Board under the legislative authority of section fifty-four of the Act?

10 THE WITNESS: A. Yes, you are correct.

Q. Does that include both your general rehabilitation program and those special rehabilitation programs that we have heard about that took place at Elliott Lake and then at Johns-Manville?

15 A. Yes, sir.

DR. DUPRE: In connection with that, while we are on section fifty-four, may I ask the following: Section fifty-four states, with respect to such rehabilitation programs:

"And the expense thereof shall be borne, in schedule one cases, out of the accident fund".

20 Does that mean that the cost of such programs is borne by industry in general, or by the firms within the rating group to which a firm that has a rehabilitation program applies?

THE WITNESS: Rehabilitation costs are not charged individually to the firm, but to the rate number, in practice.

25 DR. DUPRE: Oh, so they...

THE WITNESS: So it is a general charge to the whole of an industry, unlike compensation and medical aid and the capitalized amount of pension. It is not charged individually to the employer's account, but is charged to the rate number.

DR. DUPRE: But it is charged to the rating group?

30 THE WITNESS: Yes, it is.

DR. DUPRE: So that if we are again bearing in mind



DR. DUPRE: (cont'd.) the SRAP program that was mounted for J-M, to which Professor Barth refers, the cost of that program was charged to the employers in rating group one thirty-seven? Is that correct?

THE WITNESS: That is correct.

MR. LASKIN: Q. Just one other matter and I had forgotten to ask you about it before, and it comes back and I just want to clear it up, it just comes back to the question of the application of the principle of the benefit of doubt.

Can I give you, for just a moment, to have in front of you, your...the Board's own submission to this Commission?

The question is this: At page six of that submission, there is set out the criteria for compensation for asbestosis, and you will see them there, Mr. MacDonald, one, two and three.

If you turn over to page twenty-three, by comparison, you will see the guidelines for compensation for lung cancer, and you will see in the guideline for lung cancer, as opposed to the criteria for the compensation for asbestosis, the principle of the benefit of reasonable doubt is specifically stated, and I'm just wondering, is it oversight or deliberate omission from the criteria for compensation for asbestosis?

A. It certainly is not a deliberate omission. Now, whether it is oversight or not, I would have to check all of the records as it relates to the criteria for asbestosis allowance, to see whether there's any other spots that it appears, but certainly from the two documents you directed my attention to, I see it's not listed in one and is listed in the other. But certainly there is no deliberate oversight. It is Board policy in every case...

Q. Including asbestosis claims?

A. ...industrial disease, accident, what have you, asbestosis or what have you, that the benefit of reasonable doubt





A. (cont'd.) shall apply.

Q. If it isn't too much trouble, could you check to see what the situation is?

A. I would like to find out myself what the gap may be. We will do that.

MR. LASKIN: Thank you, Mr. MacDonald, and thank you very much for being so patient.

Those are all my questions, Mr. Chairman.

DR. DUPRE: Thank you.

Mr. Lederer?

MR. LEDERER: No, thank you, Mr. Chairman.

DR. DUPRE: Mr. Riddell, do you have any questions?

MR. RIDDELL: No questions.

DR. DUPRE: Dr. Mustard? Dr. Uffen?

I have no further questions either, so may I, indeed... sorry, Mr. Cauchi?

Oh, I'm sorry.

MR. BUONASTELLA: Sorry. I'm again replacing Mr. McCombie.

DR. DUPRE: Yes, you are here for Mr. McCombie. I'm sorry.

MR. BUONASTELLA: Mr. Buonastella, Orlando Buonastella.

DR. DUPRE: Mr. Buonastella, if you please, sir.

MR. BUONASTELLA: Yes, I don't have very many questions so it won't delay sitting very long.

CROSS-EXAMINATION BY MR. BUONASTELLA

Q. I was taken a little aback at your comment that the appeal system is quite independent of the Board. I think from my experience it's more than just an image. It seems to me that whenever there is a medical dispute, the file is sent...at an



5 Q. (cont'd.) appeal...the file is sent for comments to the Board doctor, and in my experience those comments, those indications from the Board doctor have never been overturned by either the appeal adjudicator or the appeal board.

Do you have any statistics that show how many of the recommendations from the Board doctors, after an appeal, are followed up by the appeals adjudicator or the appeal board? Is that the rule?

10 A. No, I have no statistics that would indicate the number that they have accepted the internal medical opinion versus some sort of outside opinion, but certainly in terms of the philosophy of the Board itself and the directions under which the appeal board operate, they are free to accept...and it is understood that they are free to accept...the best legal opinion that is available, the most competent legal opinion that is available.

15 Q. Okay. My second one deals with some of Professor Weiler's recommendations in terms of improving the...or making the appeal system more independent.

20 Wouldn't you think that his recommendation that the chairman of the proposed appeal system, that he be part of the appeal board, will be seen, will certainly be seen as an impediment in the independence of a new appeal system?

25 A. If you were here this morning, sir, I think you will recall that I specifically stated my personal opinion that the perception would be that it was not truly independent under those circumstances.

Q. Okay. Would there be, in fact, also a lack of independence in fact, or...

30 A. I don't believe there would be. If you want my most sincere and honest opinion, I don't think it matters in terms of true independence and how they can in fact operate unilaterally. I don't think it really matters in the substance





5 A. (cont'd.) of how they would operate - whether they are part of the Board, paid by the Board, located elsewhere and paid by someone else. They are truly independent and if we are talking about perception, the very moment they start rejecting claims for whatever reason, then they themselves will become suspect as being somehow or other part of a bureaucracy. I think that's human nature.

10 Q. Along the same token, the part of the new appeal system that would be made independent, according to Weiler, would only be those appeals that right now are covered by the appeal board, which is the last level of appeal, and that's about twenty-five, twenty-seven percent of all appeals, I would guess.

15 A. I think the Board must have, within its own system, some review so that we don't clutter up a total new appeal system with claims that can in fact already be allowed, if you will, by virtue of new information or additional information.

20 Perhaps you are referring to the suggestion that Weiler is saying that all the claims that existed under the old system should only be dealt with by the old system. I'm not very sure that's necessarily a good idea. I think that it may well be that all those old claims may in fact be dealt with by the new system as well.

25 Q. No, I'm basically expressing an opinion that since the proposal to have an independent appeal system only relates to a percentage of the appeal system - basically the ones covered by the appeal board.

A. Well, it will apply to any adverse decision, period.

Q. I thought he wanted to keep the present appeals adjudicator system in place...

30 A. Well, I think that's a good idea and to the advantage of injured workpeople, because it gives them one more



A. (cont'd.) chance to get additional information before an administrative tribunal and to get rapid decision making.

5 The minute there is an adverse decision that stands, then it will be appealable to the new group.

Q. Okay. And the last point I wanted to hear your comment on was the question of how to compensate for industrial diseases...the two systems in place in coexistence with each other - the compensation system for clearly industrial-related disease, and the new universal scheme for all others.

10 Now, if this was in place and they were living in coexistence, wouldn't you see a danger or a tendency on the part of the compensation part of it that requires a constant improvement of scientific knowledge in order to improve the determination of industrial diseases? As we know, there's lots of grey areas still.

15 Wouldn't there be a danger of a tendency for the compensation side to say, well, this is it, you know, like these are the guidelines and we'll shift you over to the other system, without trying to improve the determination of the causality of the industrial disease?

20 A. I think if you recall, I also said this morning that I felt that it should be independent, competent authority that should determine guidelines, that should do research, and it should make its expertise available to the compensation system, and I would also believe that it should also make its expertise available to whatever system is responsible for a universal scheme, and thereby keep them in parallel.

25 MR. BUONASELLA: Those are all my questions. Thank you very much.

MR. CAUCHI: I'm glad you mentioned the fund for rehabilitation division, Mr. Chairman.

30 CROSS-EXAMINATION BY MR. CAUCHI

Q. I seen a report of an adjudicator from an appeal



5 Q. (cont'd.) hearing which states that the appellant would keep on receiving funds from section fifty-three, for the vocational rehabilitation program.

Is there a special fund for that program?

A. Section fifty-three is now fifty-four.

Q. Section fifty-three. I have it right here if you want to see it.

10 A. It is a description of the section under which the funds are paid, and each year there is a tabulation of the payments made under that section, for rehabilitation. There is not a separate fund in the sense that there is not a separate fund for compensation and medical aid either - they are all a part of the accident fund - but each of them are coded to identify whether or  
15 not they are accident costs, compensation, medical aid or in this case, rehabilitation.

'Fund' is a misnomer, to a degree.

Q. It's not just a fund created for the Johns-Manville rehabilitation program?

20 A. It is payments made under that section of the Act, and a tabulation of the total made annually under that section.

Q. So you mentioned medical aid, the same fund, and it states in this appeal hearing that members shall receive medical aid plus the funds.

25 How would you compensate for medical aid when say a compensable person has a broken leg and he is taking drugs for something else because of that leg giving him pain in his arms? Is this all medical aid? While he is on compensation?

A. Any drugs which are prescribed by his doctor, arising out of his medical condition, under the Act, including  
30 drugs for pain, are part of medical aid, yes.

If there are drugs that he is taking for other





5 A. (cont'd.) conditions, unrelated to his compensable condition, they are not paid for and we have no authority to pay for them, under medical aid.

Q. Who is to say that it is unrelated?

A. That is a medical determination.

Q. Is there recourse for appeal if you...

10 A. Any decision made by any individual at any level of the Board is appealable.

15 Q. Well, I tell you, I mentioned this to you because I think you are the last person I have to talk to about it - I talk to anybody about it - I was refused medical aid for the last seven years, and I been under the asbestos dust effects program for seven years, and my doctor tell me your pills is strictly for your lungs, and the Compensation Board refused to pay me for the last seven years, for my lung condition.

A. And have you appealed that decision, sir?

20 Q. I never was told that I could appeal it. I'll show you the letter that I got seven years ago.

A. I repeat: Any decision taken at the administrative level, by anybody at the Board, is appealable.

25 Q. I keep waiting...by the way, I never appealed directly. When I send the bill, they send it back to me and they say it's not compensable.

A. I brought that up with my counsellor, and my counsellor was checking into it for the last seven years, without a definite answer.

30 A. Would you like to talk to me individually later, sir?

Q. I shall do that tomorrow, sir. Yes.

I have another question for you, since you been talking about this other program, that management board discuss on a weekly or twice monthly basis, you said, right?



A. The management committee? Yes.

5 Q. Twice-monthly basis. In 1980, on May 23rd, the Minister of Labour stated in the Legislature, after he was asked a question why medical aid is not provided to those people that are sent a form, like everybody else is sent a form, like I just finished saying - if you don't agree with the decision, you have the right to appeal.

10 Now, you know and I know that it costs a lot of money to have legal services, and appear at a Compensation Board hearing. It takes quite a few days for the legal advisors to go through the papers and everything else. I know that could be an enormous burden on a person that is seeking compensation.

15 Why has the Compensation Board never adapted the program, as Mr. Elgie suggested to the Legislature on May 23, 1980, that if you don't agree with the decision you have the right to appeal and a legal services phone number is so-and-so?

A. I'm not sure what you are saying to me.

20 Q. You are not advertising for legal - that's what I'm saying. You are not advertising that you have legal experts and there are legal advisors. You have what you call...

A. Workermen's advisors?

Q. Worker advisors, yes. You don't advertise it.

A. I think you will find that some of our literature describes the operation of...

25 Q. Who gets that literature?

A. I'll undertake to make sure that you have copies of the literature that talks about the rights to appeal and the availability of the workmen's advisors.

30 Q. Yes. Everybody gets that, yes. What I'm talking about isn't about the book - about the letter that is sent to you by the adjudicator, the adjudicator sends you a letter that there is no case for your disability to be compensated, and





Q. (cont'd.) if you don't agree with the decision taken, you have the right to appeal.

5 A. Does the letter say that?

Q. I believe in 1980, like I said, again, in the Legislature...it's in that book that there is workers' advisors - I agree with you, I grant you all that...but in that letter, when a lady reads that letter, she phones somebody from either the union or the legal community or her member of parliament, and says I have  
10 the right to appeal, would you appeal for me.

Why can't she once have heard that there is a legal advisor or workers' advisor that will help you with your appeal?

A. Why can't who say that, sir?

Q. Whoever sends the letter - the Workmen's Compensation Board.  
15

A. As I understand the practice, that is the notice that is sent out - that you have the right to appeal.

DR. DUPRE: I think Mr. Cauchi's point would really be the following: See, we have specific examples of all of these letters in the Barth Study, on pages two, thirty-six to two, forty,  
20 and picking any of those letters at random there is a standard paragraph that appears in every one of them, which is:

"If you have any reason for objecting to this decision, or have any concerns or questions about the matter, please let us know as soon as possible".

The question, I guess, that Mr. Cauchi does prompt in my mind would  
25 be whether a paragraph like that might not be fleshed out so that it then goes on to say in a succeeding sentence - we have workers' advisors who are available to help you or to advise you if you wish to make an objection.

Is that what...?

MR. CAUCHI: Exactly, sir. You are right. That's  
30



MR. CAUCHI: (cont'd.) exactly what was said in the  
Legislature on May 23, 1980, the same thing.

Not everybody got that booklet, by the way, okay?

THE WITNESS: A. I know. I understand.

Did you make that point with Mr. John McDonald  
when he was here? Did you make that point with Mr. John McDonald,  
who is in charge of that division, when he was here?

MR. CAUCHI: Q. I'm sorry, I was late, and I  
didn't question...

DR. DUPRE: I don't believe any of us raised it  
with Mr. McDonald.

THE WITNESS: All right. I have notice of your  
position that included in that letter there should be a reference  
to the workers' advisors, and perhaps reference to the booklet  
on how to appeal.

MR. CAUCHI: Q. One final question, on May 23,  
1980, until May 24, 1980, the minister stated in the Legislature  
again, and this is one of great concern, especially to me since  
I been trying to get some of these people on rehabilitation...  
Dr. Elgie, the then-Minister of Labour, stated in the Legislature  
quote:

"I may tell the Member if he has any concerns  
about the possibility of the eventual closure,  
that I have had discussions with the Board  
already, and any worker with any evidence of  
an illness related to exposure to asbestos would  
immediately be given entry into the special program.  
The Board will do everything it can, should such  
an eventuality occur, but I have no reason to  
believe it will happen".

This is before they discontinued, and we raised the question with  
the minister upstairs, at 400 University, and the next day he goes



5 Q. (cont'd.) to the papers and states the same thing, on May 24th, that the Board will allow those workers who are disabled in some way, into the special program.

"Normally the Board program accepts only those people who have suffered some disability and remain in a risky situation at the time of application," but since Johns-Manville was closing down, this put some of the workers in an impossible situation, because they are losing their jobs and at the same time losing claims that the risk environment would entitle them to WCB rehabilitation.

Are you aware of this statement?

A. Yes, I am.

15 Q. Are you aware that some of our people are still waiting to join the program?

A. No, I am not.

Q. You are not?

A. As far as the Board is concerned, the Board was prepared if any of those people wanted to have the rehabilitation program, our claims department was instructed to provide them whatever assistance they could.

20 Are you telling me that there are individual cases that have been refused rehabilitation assistance?

25 Q. Yes. Unfortunately, two of them have died within the last six months, and two of them are...one is in the appeal hearing position, is going through a lot of expense hiring his own lawyers, and the other one is going through a lot of mental distress because of the conditions - as everybody are aware today - the conditions of the employment situation, the money situation, the family to raise, and yet this man has been told for the last two years that he is not eligible for the program.

30 Yet this man was interviewed to join the program when he was working. Now that he is not working there anymore, because





Q. (cont'd.) the plant is not there anymore, he is not eligible all of a sudden.

A. Is that the reason he is not eligible? You know, the people you describe don't sound to me as if they are available for employment. Are you telling me there is somebody who is available, willing and able to be re-employed, who has been refused assistance by the rehabilitation program?

Q. Yes, sir.

A. I would certainly like to know more...

Q. He is sitting right here.

MR. CAUCHI: That's all the questions, Mr. Chairman.

Thank you.

DR. DUPRE: I think we have established the Commissioners and I have no further questions, so may I first of all thank Mr. Riddell for his attendance today, and of course thank you, Mr. Neal, for the very useful memorandum you have supplied, and of course most warmly, thank Mr. MacDonald, the witness, for his most educational testimony. You have been very good for us, indeed, sir. Thank you.

We now rise until nine a.m. tomorrow morning, counsel?

MR. LASKIN: Yes, Mr. Chairman.

-----  
THE INQUIRY ADJOURNED

THE FOREGOING WAS PREPARED  
FROM THE TAPED RECORDINGS  
OF THE INQUIRY PROCEEDINGS

Edwina Macht  
EDWINA MACHT







